Unwilling or unable?

Assessing the failure of the Rule of Law Framework and Article 7 TEU in Poland

Oskar Polański

ABSTRACT

Since 2015 the Prawo i Sprawiedliwość (PiS) government in Poland has engaged in a process of rule of law backsliding, viz., it has eroded various forms of checks and balances in order to entrench itself in power. It has, *inter alia*, disabled effective judicial review, replaced judges in courts across the country, and introduced a disciplinary regime for recalcitrant judges. This process poses a threat to the very existence and functioning of the European Union: by controlling the judiciary, the regime can pick and choose which EU laws will be complied with. Such selective compliance undermines fundamental concepts upon which the very functioning of the EU's legal order is based such as, *inter alia*, mutual trust, autonomy, and supremacy.

However, despite this threat, the EU's institutions have thus far been unable – or unwilling – to adequately resolve this crisis. By considering the implementation of the Rule of Law Framework and Article 7 TEU, this thesis will present four key lessons the EU must adhere to in its future dealings with backsliding Member States. Namely, the EU must resort to hard enforcement; be responsive to the time-sensitivity of backsliding; ensure its tools are accessible; and avoid leaving the protection of its values solely to the protection of intergovernmental institutions. These lessons are believed to be integral to neutralising the threat posed by backsliding and persevering the integrity of the EU's legal order.

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Contents

Abbreviations

CJEU	Court of Justice of the European Union
CT	Constitutional Tribunal
DC	Disciplinary Chamber
NCJ	National Council of the Judiciary
PiS	Prawo i Sprawiedliwość (Translation: Law and Justice)
RLF	Rule of Law Framework
SC	Supreme Court

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Introduction

The European Union (EU) is a unique 'supranational constitutional order'.[1] This supranational characteristic has partly been shaped by the developments in the EU's legal system, which is particularly distinguishable through the principles of autonomy and supremacy.[2] The former dictates that the EU's legal system operates independently of national and international law, setting its own legal rules and provisions which must be respected in its own legal sphere.[3] This is complemented by the concept of supremacy, which requires that provisions of domestic law cannot undermine or counteract EU law, and therefore must be disapplied in the event of a clash.[4] These concepts *inter alia* allow the EU to create binding and authoritative rules within its own legal space.[5]

However, in the past decade the operation, functioning – and possibly the very existence – of the EU's supranational legal order has become threatened by developments within certain Member States.[6] This threat began to materialise after Hungary's turn to illiberalism following the election of Fidesz in 2010,[7] and has intensified since 2015, when the Prawo i Sprawiedliwość (PiS, translation: Law and Justice) government was elected in Poland. Both

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[1] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141, 145.

[2] See Joseph HH Weiler, 'The Transformation of Europe' (1991) 100(8) Yale LJ 2403, 2413-2419; Justin Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) 13(1) Eur J Legal Stud 271, 277-278.

[3] See, e.g., Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; *Opinion 2/13 on Accession to the ECHR* EU:C:2014:2454, paras 166-170; *Opinion 1/17* EU:C:2019:341, paras 109-111.

[4] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585. See also Miriam Aziz, 'Sovereignty Lost, Sovereignty Regained? The European Integration Project and the Bundesverfassungsgericht' (2001) EUI Working Papers RSC No 2001/31, 3 <http://hdl.handle.net/1814/1740> accessed 29 August 2021.

[5] See Lindeboom (n 2), 278-279, 282.

[6] See, e.g., Robert Grzeszczak and Stephen Terrett, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience' (2018) 69 NILQ 347, 349; Franco Peirone, 'The Rule of Law in the EU: Between Union and Unity' (2019) 15 Croat YB Eur L & Pol 57, 98. See also Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse *Solange*, and the Responsibilities of National Judges' (2019) 15 EuConst 391, 406.

[7] See Nóra Chronowski and Márton Varju, 'Constitutional Backsliding in Hungary' (2015) 3 Tijdschrift voor Constitutioneel Recht 296; László Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015) 5-32.

regimes adopted a similar approach, both actively undermining the independence of their judiciaries, in turn violating separation of powers and the rule of law. In Poland, for instance, this was achieved through the dismantling of effective judicial review by turning the Constitutional Tribunal (CT) into a supporter of the regime; creation of new judicial appointments procedures which allowed the regime to appoint judges not on merit but upon regime sympathy; the lowering of retirement ages so as to force out independent judges and make room for political appointments; the introduction of a disciplinary regime in order to sanction any recalcitrant (read: independent and impartial) judge.[8] In so doing, these regimes have actively 'sought to undermine liberal democracy' by dismantling checks upon their power.[9] Accordingly, the events transpiring in Poland and Hungary have been referred to as 'rule of law backsliding': a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party'.[10]

These developments violate the values upon which the EU is based.[11] Indeed, Article 2 TEU stipulates that the EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights' and clarifies that these 'values are common to the Member States'. These values comprise the foundations of the EU and are crucial to its very functioning.[12]

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[8] See Chapter 2.

[9] Bojan Bugarič, 'The Right to Democracy in a Populist Era' (2018) 112 AJIL Unbound 79, 80.

[10] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3, 10. See also, Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 Trinity CL Rev 35, 37; Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-Between" Democracy and Authoritarianism' (2015) 13 ICON 219; Jan-Werner Müller, 'Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Member States' (2014) 93(2) Foreign Affairs 15.

[11] See Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 83.

[12] See Gábor Halmai and Kim Lane Scheppele, 'The Tyranny of Values or the Tyranny of One-Party States?' (*Verfassungsblog,* 25 November 2019) <https://verfassungsblog.de/the-tyranny-of-values-or-the-tyranny-of-one-party-states/> accessed 4 May 2021; Armin von Bogdandy, 'Fundamentals on Defending European Values' (*Verfassungsblog,* 12 November 2019) <https://verfassungsblog.de/fundamentals-on-defending-european-values/> accessed 24 August 2021).

Thus, if Member States consistently undermine the rule of law – one of the EU's fundamental values[13] – the EU's constitutional framework will be at risk.[14] The damage posed to the functioning and integrity of the EU legal order through backsliding – more specifically, the lack of judicial independence – is evident in *inter alia* two ways.

First, it undermines the assumption of mutual trust. Indeed, the EU's legal framework is based upon 'mutual legal interdependence and mutual trust among its members'.[15] In other words, the functioning of the EU's legal order is based upon the assumption that the Member States are all equally committed to the values in Article 2 TEU and, in sharing a common set of values, they will accordingly respect and uphold laws introduced by the EU that aim to implement and enforce these values. This is complemented by 'mutual recognition of judicial decisions.'[16] Accordingly, the absence of judicial independence in one Member State may undermine the application of mutual trust and signal an end to 'Europe's regulatory and judicial interconnected space'.[17] We can see this problem materialise in the context of European Arrest Warrants.

In the *LM* case the CJEU, responding to a question posed by the Irish High Court as to whether it had to comply with a European Arrest Warrant issued by Poland given the constant undermining of judicial independence there and the risk this posed to an individual's right to a fair trial, held that the absence of judicial independence could serve as a ground for refusal to surrender.[18] The CJEU's decision may be understood as indicative of the importance that

[13] European Commission (Commission), 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' (Communication) COM/2019/163 final, 1.
[14] See, e.g., Gábor Halmai, 'How the EU Can and Should Cope with Illiberal Member States' (2018) 38(2) Quaderni Constituzionali 313, 325; Pech and Scheppele (n 10) 11.
[15] Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Closa and Kochenov (n 11) 61. See also Opinion 2/13 (n 3) paras 167-168, Commission Communication (n 13) 2; Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law' in Closa and Kochenov (n 11) 16-18; Müller (n 1) 145.
[16] Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512, 520-521. See also Article 67 TFEU.
[17] Kochenov and Pech (ibid); Lavelle (n 10) 36-37. See also Laurent Pech and Kim Lane Scheppele, 'Open Letter to the President of the European Commission' (*Verfassungsblog,* 11 December 2019) <https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission/> accessed 24 August 2021; Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM/2014/0158 final, 4.
[18] Case C-216/18 PPU, *Minister for Justice and Equality v LM (Deficiencies in the system of justice)* EU:C:2018:586, para 59. But note that the test which the executing authority must satisfy is extremely

judicial independence has for the very functioning of the European Arrest Warrant system.[19] Indeed, given its basis in mutual trust,[20] the mechanism rests on the assumption that all national courts have the capacity to ensure equal protection of rights to the individual.[21] It is by virtue of this guarantee that national courts can then operate on the basis of sincere cooperation and presumption in favour of surrendering individuals under the European Arrest Warrant.[22] After all, the system is based on these courts exchanging information in good faith.[23] If then, a national court issuing such a warrant is suspected of not being sufficiently independent, this undermines the assumption of mutual trust and stands as an obstacle to the operation of sincere cooperation between national courts and EU institutions which is required for the functioning of mechanisms such as the European Arrest Warrant. Simply put, a judiciary which is not independent precludes the possibility of seamless judicial cooperation which is required for the functioning of *inter alia* the EU legal sphere of freedom, security, and justice.[24] Commissioner Věra Jourová was therefore right when she stated that, 'if one national system of judiciary is broken, the EU system is broken.'[25]

Secondly, backsliding threatens the validity of EU laws. Indeed, because the enforcement of EU law relies on national courts, viz., the laws adopted at EU level cannot be transposed into domestic legal systems by the EU, and therefore compliance with these norms rests solely

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demanding (ibid para 73; Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU' in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (TMC Asser Press 2020) 274).

[19] *LM* (n 18) para 55; Leandro Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence' (2021) 58 CML Rev 683, 688-691, 708-710.

[20] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, [2002] OJ L 190/1, recital 10.

[21] Case C-168/13 PPU, *Jeremy F.* EU:C:2013:358, paras 49-50.

[22] See *LM* (n 18) paras 57-58; Mancano (n 19) 688.

[23] Mancano (n 19) 704-705.

[24] Armin von Bogdandy, 'Principles and Challenges of a European Doctrine of Systemic Deficiencies' (2020) Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper 2019-14, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431303> accessed 24 August 2021. See also Eugene Regan, 'The role of the principles of mutual trust and mutual recognition in EU law' [2018] Il Diritto dell'Unione Europea 231, 231; Kochenov and Bárd (n 18) 272.

[25] Věra Jourová, 'Equipping Europe with better tools to defend the rule of law and democratic values' (*EC Press Corner*, 8 July 2020) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1313> accessed 24 August 2021.

with Member States and their courts,[26] a problem arises where a judiciary in one Member State purposefully misconstrues, misapplies or openly undermines a provision of EU law.[27] It means that the application of this particular provision will be undermined. The events developing in Poland illustrate this threat well.[28]

After the adoption of the Law on the Supreme Court (SC) in December 2017, a Disciplinary Chamber (DC) was introduced into the structure of the SC, staffed completely with judges appointed by a politicised judicial appointments body.[29] The regime began to use this pseudo-Court to bring disciplinary proceedings against judges who criticised the regime's judicial reforms.[30] In response, and at the request of the Commission, the CJEU issued an interim relief order in April 2020 requiring disciplinary proceedings to cease.[31] In turn, the DC began to discipline judges through alternative means, such as through the fabrication of bogus criminal charges as reasons for the revocation of judicial immunities (which also meant a suspension of their judicial duties and a lowering of their salaries).[32] The decision was therefore creatively ignored.

Moreover, the DC brought a case to the CT to assess whether interim relief orders concerning the structuring of a judicial system in a Member State were binding.[33] In other words, the

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[26] See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117*,* paras 32-37, and Aleksandra Kustra-Rogatka, 'The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism' (*Verfassungsblog,* 14 November 2019) <https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/> accessed 24 August 2021.

[27] See, e.g., Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence' (2020) 27(1) MJ 105, 108-109; von Bogdandy and Spieker (n 6) 415. Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: what it is, what has been done, what can be done' (2014) 51(1) CML Rev 59, 64.

[28] For further discussion, see Chapter 2 Section 3.2.

[29] Commission, 'Commission Recommendation (EU) 2018/103 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520' [2018] OJ L 17/50, para 25 (hereinafter "Recommendation 4 2017").

[30] Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland' (2020) 12 HJRL 451, 466.

[31] C-791/19R *Commission v Poland (disciplinary regime for judges)* EU:C:2020:277. See also Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland* (Interim proceedings)' (2021) 58(1) CML Rev 137.

[32] Adam Bodnar and Paweł Filipek, 'Time is of the Essence' (*Verfassungsblog,* 30 November 2020) <https://verfassungsblog.de/time-is-of-the-essence/> accessed 24 August 2021; Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 HJRL 1, 31-32.

[33] Constitutional Tribunal, Judgment of 14 July 2021, P 7/20.

improperly appointed DC (whose suspension was ordered by the CJEU) sought affirmation from the politicised CT that the decisions of the CJEU were not binding. Unsurprisingly, the CT decided with the DC; interim relief orders issued by the CJEU regarding the functioning and operation of the Polish justice system were held to be contrary to the Polish Constitution. Therefore, decisions to that effect would be deprived of primacy and direct applicability.[34] The ruling constituted a response to the CJEU's interim relief order which – along with any other interim relief order concerning the operation of the Polish judiciary forthwith – is likely rendered inapplicable in Poland. In other words, the regime used its subordinated judicial machinery to deprive EU law's application in the Polish legal sphere. This undermines the crucial concepts of supremacy and autonomy.

Rule of law backsliding may therefore lead to dysfunction in the EU's legal order. Namely, for the EU's legal order to persist, the EU needs to ensure that *it* is the one to define its laws (in line with the concept of autonomy), and that its laws and their interpretations or validity cannot be undermined at the domestic level (in line with the concept of supremacy).[35] A legal order can hardly be such if it is unable to enforce its own rules. If EU law is unable to be applied and interpreted uniformly, the EU's legal rules will lack legal certainty, thereby further detracting from the validity of these norms as they *themselves* will be contrary to the rule of law.

Therefore, to borrow Scheppele, Pech and Kelemen's metaphor, rule of law backsliding has started a fire in the EU's constitutional framework.[36] Taking this metaphor further, it is possible to argue that what started off as a relatively small flame in the legal system of one

[34] ibid. This refers not to the direct applicability as a doctrine of EU law, but as a principle stated in the Polish Constitution. See The Constitution of the Republic of Poland (2 April 1997) (hereinafter "Polish Constitution"), Article 91.

[35] See, Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1057-1058; Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and others* EU:C:2021:403, Opinion of AG Bobek, para 138; Michał Ziółkowski and Barbara Grabowska-Moroz, 'Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses' (*Verfassungsblog*, 26 November 2019) <https://verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/> accessed 24 August 2021; Hillion (n 15) 60-61.

[36] Laurent Pech and Kim Lane Scheppele, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism' (*Verfassungsblog,* 12 November 2018) <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/> accessed 24 August 2021.

Member State[37] has turned into a fully-fledged fire which is burning, i.e. harming, the functioning of the EU legal order. Accordingly, in order to protect and preserve its unique supranational legal order, the EU must extinguish this fire.[38] However, despite the start of rule of law crisis in 2010, over a decade later nothing substantial has been achieved on the ground.[39] On the contrary, Poland joined Hungary in its backsliding in 2015, exacerbating the threat to the EU. This has led Kochenov to question whether the EU is 'content' with the situation, or if it is simply 'powerless.'[40]

The EU's institutions are constantly creating new tools,[41] and condemning the events in Poland and Hungary. It therefore *prima facie* is not a matter of acceptance. Thus, Kochenov posits, powerlessness may be to blame.[42] However, if the EU is indeed powerless, this is not to say that it needs to remain powerless.[43] One could view the EU's hitherto unsuccessful remedies to rule of law backsliding as a process of trial and error. Niklewicz makes an interesting point in this context:

> An old adage attributed to Prussian Field Marshal Helmut von Moltke the Elder says that "no plan survived contact with the enemy". Although this rather militaristic parallel might seem exaggerated or inappropriate, its logic

[37] See Chapter 2, Section 2.1.
[38] Müller (n 15) 145-146; Bugarič (n 11) 92-93.
[39] See Laurent Pech, 'Protecting Polish Judges from Political Control' (*Verfassungsblog,* 20 July 2021) <https://verfassungsblog.de/protecting-polish-judges-from-political-control/> accessed 24 August 2021; V-Dem Institute at University of Gothenburg, 'Autocratization Turns Viral: Democracy Report 2021' (2021), 20 <https://www.v-dem.net/media/filer_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr_2021_updated.pdf> accessed 24 August 2021.
[40] Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) EUI Working Paper No LAW 2017/10, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965087> accessed 24 August 2021.
[41] See, e.g., Commission, 'The EU Justice Scoreboard. A tool to promote effective justice and growth' (Communication) COM/2013/160 final; Commission Communication 2014 (n 17); Council of the European Union (Council), 'Press Release, 3362nd Council meeting, General Affairs', Brussels, 16 December 2014, Doc 16936/14, 20-21; Commission, 'Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement' (*EC Press Corner,* 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4169> accessed 24 August 2021; Parliament and Council Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ LI 433/1. For an assessment, see Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) RECONNECT, Working Paper No 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608661> accessed 24 August 2021.
[42] Kochenov (n 40).
[43] The doctrines established in *Van Gend en Loos* (n 3) are proof of this. See Von Bogdandy (n 24) 21.

> is correct. The mechanisms designed to protect the Union's core values from being breached have failed: the EU should acknowledge this and move on. There are ways to fix the EU defences in the area of the rule of law. The EU institutions can still prove that they mean… it when they say that they care about the essence of liberal democracy.[44]

Accordingly, and in line with this assessment, the purpose of this thesis is to consider why the EU has thus far failed to resolve rule of law backsliding in Poland, and to illustrate a series of lessons the EU must draw from this experience. These lessons, if adhered to, are believed to strengthen the EU's capacity to protect its future functioning by addressing backsliding within its Member States in a more efficacious manner.

Scope of the thesis

While the EU's anti-backsliding toolkit is constantly developing, the scope of this thesis is confined to an assessment of two mechanisms, viz., the Rule of Law Framework (RLF) and Article 7 TEU.[45] The former is a monitoring tool which allowed the Commission to assess a situation in a Member State and issue recommendations with the hope that a 'structured dialogue' would be sufficient at preventing a deterioration in the rule of law. In its final stage the mechanism could lead to the activation of Article 7 TEU, although the conclusion of this mechanism is not a requirement for the initiation of Article 7. This latter mechanism may itself be broken down into a further two: a preventative and a sanctioning mechanism.[46] Article 7(1) TEU aims to prevent threats to the EU's values from becoming violations either through recommendations issued by the Council to a Member State or through the issuing of a warning that a Member State is posing a 'clear risk of a serious breach of the values found in Article 2 TEU'. Its sanctioning mechanism is found in Articles 7(2) and 7(3) TEU. If the European Council can attain unanimity and declare that a Member State has violated the EU's values in a 'serious and persistent' manner (Article 7(2) TEU), the Council may then (in a separate procedure) issue sanctions under Article 7(3) TEU.

[44] Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' (2017) 16 EurView 281, 288; Lawrence Freedman, *Strategy: A History* (OUP 2013) 104.
[45] Commission Communication 2014 (n 17) and Article 7 TEU.
[46] See Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 223.

The RLF and Article 7's preventative arm have been used against Poland (to varying extents) and have failed to resolve backsliding. With the EU's reservations regarding the initiation of its mechanisms against Hungary – a serious problem in itself, but one which is beyond the scope of this thesis[47] – we may focus on the inability of these mechanisms to resolve backsliding in Poland. Given the aim of the thesis to extract lessons from the EU's experience, such a narrow scope – focusing on two mechanisms in the context of one backsliding State – is believed to be appropriate as it allows for a more comprehensive engagement with the tools and the reasons for their ineffectiveness.

Structure

Chapter 1 will engage in a contextual assessment of the RLF and Article 7 TEU in order to explain how the mechanisms developed and how they were to function. First, the origins of Article 7 and its amendments following the Haider Affair – where the EU's Member States imposed a series of unilateral diplomatic sanctions on Austria for forming a government with FPÖ, a far-right political party – will be discussed. It will also be highlighted how this episode led to the unfounded perception of the tool as 'nuclear' and unusable. Subsequently, it will be illustrated how the EU's search for alternative tools began, which is what ultimately led to the formation of the RLF.

Chapter 2 will engage in a contextual assessment of the RLF and Article 7 TEU in Poland. In order to illustrate how the mechanisms were implemented and how they failed, the chapter will first present how the Commission's attempts at dialogue through the RLF were met with defiance and hostility from Poland. Secondly, it will be illustrated how the Council has failed to effectively utilise Article 7(1) TEU, activated by the Commission after it acknowledged the RLF's inability to bring about change in Poland. The Council has failed to make use of the tools available under the preventative arm; it has construed a deficient format for its hearings; and it appears to have delegated the task of protecting the EU's values completely to the EU's other institutions, thereby illustrating a failure to acknowledge the severity of the crisis and the threat posed by backsliding.

[47] See Gábor Halmai, 'The Fall of the Rule of Law in Hungary and the Complicity of the EU' (2020) 12 Italian J Pub L 204, 211.

Chapter 3 considers the reasons for the ineffectiveness of the RLF and draws lessons from its implementation. The chapter focuses on the RLF's soft law nature, and the discretion left to the Commission under the mechanism which allowed it to engage in protracted dialogue. In assessing the former aspect, it will be argued that tools which lack a sanctioning or hard enforcement element are unsuitable for enforcing compliance when dealing with uncooperative actors. As to the latter, it will be highlighted that the Commission's protracted discussions and its failure to escalate the EU's response – dialoguing with Poland to no effect for almost two years – gave the Polish government more time to entrench itself in power and thereby limited the EU's ability to resolve rule of law backsliding. This is because the more time regimes have to entrench themselves in power, the more difficult it will be to instigate change or to reverse the damage.

Chapter 4 considers the reasons for the ineffectiveness of Article 7 TEU and draws lessons from its implementation. First, it will be argued that the EU's failure to activate Article 7 in a timely manner weakened the EU's capacity to resolve backsliding and neutered Article 7's sanctioning arm given the unanimity threshold being rendered unattainable after Poland joined Hungary in its backsliding. The chapter will subsequently consider issues regarding the construction of the tool, i.e. its high procedural thresholds which render the tool inaccessible and unusable and its intergovernmental nature which renders decisions over the protection of the EU's values prone to being outweighed by diplomatic expediency or financial considerations of States, thereby allowing matters of fundamental concern to the EU to be devalued and trivialised.

The thesis will conclude by reiterating the lessons drawn the implementation of these tools. In short, the EU must resort to stricter means of enforcement when dealing with uncooperative actors. It must acknowledge the time-sensitivity of rule of law backsliding and therefore be pragmatic and react appropriately to its failures and ensure minimal delay in using its tools. It should not introduce mechanisms which are unusable, such as tools with unattainable procedural thresholds. More importantly, though, it should not rely solely on intergovernmental decision-making when its own values are at stake. These lessons may not be novel, but it is argued they are crucial for the EU's future handling of the rule of law crisis.

Chapter 1: Development of the Rule of Law Framework and Article 7 TEU

1. Introduction

Initially the EU's main tool for enforcing compliance came in the form of the infringement's procedure, now found in Articles 258-260 TFEU.[1] This mechanism allows the Commission to bring a case to the CJEU if a Member State commits 'specific violations of EU law'.[2] The CJEU may in turn instruct the Member State on the measures it must adopt to remedy the breach, and if it refuses to comply with this legal obligation, the Commission may request the CJEU to impose penalty payments or a lump sum as a form of sanctions.[3] However, this mechanism was initially confined only to the enforcement of the 'acquis', viz., 'the rules of EU law',[4] and while the Court was able to enforce human rights as law,[5] it appeared that certain values were not encapsulated in the EU's acquis and were therefore unenforceable under the infringements procedure.[6]

Accordingly, with the EU lacking a tool explicitly capable of enforcing all of its core values, '[t]he initial version of the Treaties relied on the *presumption* of compliance by the Member States with the – then non-codified – values of the Communities, expressed in [*inter alia*] the

[1] Dimitry Kochenov and Laurent Pech, 'Better Late than Never: On the European Commission's Rule of Law Framework and Its First Activation' (2016) 54 J Common Mkt Stud 1062, 1062.
[2] ibid.
[3] Article 260 TFEU.
[4] Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) 113. See also Laurence W Gormley, 'Infringement Proceedings' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 66-70.
[5] See Case 11-70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1125, paras 3-4; Robert Schütze, *An Introduction to European Law* (3rd edn, OUP 2020) 84-6
[6] Kochenov (n 4) 133.

Schuman Declaration.'[7] The values of the (now) EU would therefore be respected *only* if all of its Member States were equally committed to upholding them. The validity of this presumption, however, became questionable in the wake of the EU's future expansions. With the inclusion of new states, and especially ex-USSR satellite states, it became increasingly untenable to maintain the presumption of compliance with the values of the rule of law and democracy.[8] In other words, the EU's growth meant that it was more difficult to ensure a homogenous grouping of Member States, all equally committed to these values. While the EU had already introduced the Copenhagen Conditionality criteria in 1993, which obliged potential applicant States to satisfy a series of requirements, such as 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities',[9] this would only work at shaping the internal functioning of States *prior* to their entry into the EU. Once they joined, the EU's capacity to police and enforce these values would be limited.[10] In turn, it became apparent that the EU would require a tool for the protection of its values in the event that Member States began to undermine them.[11]

The first tool introduced to resolve this problem is now found under Article 7 TEU. This tool, however, proved unable to resolve the rule of law crisis (owing to the refusal of the EU's institutions to activate it) and after the failure of the infringements procedure to do the same, the EU resorted to the creation of the RLF.

The aim of this chapter is to provide a contextual explanation over the development and functioning of Article 7 TEU and the RLF. This will in turn allow us to consider whether they were used correctly against Poland, and to subsequently begin considering their ineffectiveness.

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[7] ibid. See also Joseph HH Weiler, 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Law* (OUP 2012) 146-149.

[8] Kochenov (n 4) 134; Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 85-86; Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jorg Haider' (2010) 16 Colum J Eur L 385, 391.

[9] See European Council, 'Conclusions of the Presidency', Copenhagen, 21-22 June 1993, SN 180/1/93 REV 1, 13; Sadurski (ibid) 425-426.

[10] Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 199-202.

[11] Kochenov (n 4) 134-135; Bruno de Witte and Gabriel N Toggenburg, 'Human Rights and Membership of the European Union' in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2004) 59.

First, Article 7 TEU – as the first mechanism introduced for the protection of the EU's values – will be considered. This discussion will be made in the context of the Haider Affair – a crucial moment in the history of the EU's enforcement capacity which shaped not only how Article 7 would function but also influence the decision of the EU's bodies not to use the tool against Hungary (when the violations there started in 2010) or Poland (when the violations started in 2015). The section will therefore begin by providing an account of the Haider Affair. Subsequently, its implications on both the mechanism's functioning, as well as its efficacy will be considered. Namely, it will be illustrated how Article 7 was amended following the Haider Affair, and in considering its negative implications, it will be highlighted that the mechanism was perceived as unusable, thereby leading the EU to consider alternative mechanisms for the enforcement of its values.

Secondly, the failure of the infringement's procedure – the other main enforcement tool available to the EU's institutions – will be illustrated.

Lastly, with the EU's original enforcement tools ineffective, calls arose for the creation of a new mechanism. In turn the Commission created the RLF. The final section will therefore explain how this new tool was to operate.

2. The formation of Article 7 and the Haider Affair

Article 7 TEU was the first mechanism devised at EU level aimed at protecting the values stipulated in Article 2 TEU.[12] To this day it 'remains the only provision in the Treaties specifically tackling the issue of Member States' respect for the founding values of the Union.'[13] It is therefore the primary tool in addressing the rule of law crisis.

In its initial form, as introduced through the Amsterdam Treaty, the mechanism (now found in Article 7 TEU) was purely a sanctioning one – if the European Council could, by unanimity, determine that a Member State had violated the EU's values in a 'serious and persistent manner', the Council could then impose sanctions against that Member State.[14] However, it soon became apparent that 'the provision [was] unusable in the event [where] a swift

[12] Bugarič (n 8) 86.
[13] Matteo Bonelli, 'A Union of Values: Safeguarding Democracy, the Rule of Law and Human Rights in the EU Member States' (PhD thesis, Maastricht University 2019) 174.
[14] ibid 176; Sadurski, 2010 (n 8) 388.

reaction to a breach was necessary'.[15] This is evident when considering the events of the Haider affair, where sanctions were imposed on Austria, but outside of Article 7's framework.

After the 1999 Austrian elections the far-right FPÖ party helped form the governing coalition. The issue was that the leader of FPÖ, Jörg Haider, and various officials within the party had been known to make xenophobic statements.[16] In turn, the EU's Member States responded by issuing a series of diplomatic sanctions,[17] purely based on the statements made by members of the FPÖ party.[18] Article 7 could not have been used as it required the existence of a 'serious and persistent' breach, and the situation in Austria, while potentially problematic, had not led to any violations of the EU's values.[19] The EU's Member States therefore acted pre-emptively, and in secrecy from the European Parliament and Commission, imposed a series of bilateral sanctions on Austria.[20] These meant that the EU's 14 Member States would 'not promote or accept any bilateral official contacts at political level' with the Austrian government; there would 'be no support in favor of Austrian candidates seeking positions in international organizations' and 'Austrian Ambassadors in EU capitals [would] only be received at a technical level'.[21] Soon after the imposition of these sanctions, a report published by the "three wise men" illustrated that there was no evidence that entering into a coalition with FPÖ created a threat for the EU's values and the sanctions were soon revoked.[22] This abrupt response from the Member States of the EU, in imposing sanctions pre-emptively, became associated with ill judgment.[23] The bilateral sanctions by the

[15] Kochenov (n 4) 135.
[16] See Günter Wilms, 'Protecting fundamental values in the European Union through the rule of law: Articles 2 and 7 TEU from a legal, historical and comparative angle' (EUI 2017) 69.
[17] On the rationales behind these sanctions see Sadurski, 2010 (n 8) 399; Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria' (2001) 39(1) J Common Mkt Stud 59, 60-61; Miklós Haraszti, 'Haiderism East of Austria: Reaction, Impact, and Parallels' (2000) 7(3) Constellations 305, 309.
[18] Bugarič (n 8) 86.
[19] Cécile Leconte, 'The Fragility of the EU as a 'Community of Values': Lessons from the Haider Affair' (2005) 28(3) W Eur Pol 620, 638-639.
[20] ibid; Sadurski, 2010 (n 8) 400.
[21] Statement from the Portuguese Presidency of the EU on behalf of the XIV Member States, Lisbon, 31 January 2000. See also Wilms (n 16) 69.
[22] Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, Report, Paris, 8 September 2000, paras 113, 116 <https://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf> accessed 25 August 2021. (hereinafter 'three wise men report').
[23] Wilms (n 16) 70, Kochenov (n 4) 135, Bugarič (n 8) 91-93, Michael Blauberger and R Daniel Kelemen, 'Introducing the debate: European Union safeguards against member states' backsliding' (2017) 24(3) J Eur Pub Pol 317.

members of the European Council were imposed without the support of, or consultation with, the European Parliament or Commission, and without any violation of the EU's values having materialised – they therefore lacked 'an appropriate legal basis'.[24] In turn, the use of sanctions became viewed as 'counterproductive',[25] and it became questionable whether the EU could viably enforce its values in the future.[26]

This unfortunate episode is significant in two respects.[27] First, and positively, it led to the amendment and restructuring of Article 7. Secondly, it created a perception of Article 7 as a 'nuclear' tool which should never be used.

2.1 First implication: amendments to Article 7

While the sanctions imposed on Austria were not formally imposed by the EU, but unilaterally by its Member States, it soon became apparent that the EU needed a monitoring mechanism which would allow for engagement with a potential crisis from the outset before an actual violation materialises, in order to avoid such a fiasco from taking place in the future.[28] It is for this reason that the Nice Treaty saw an inclusion of an additional, preventative arm, into the mechanism. Therefore, after the Haider affair and subsequent treaty amendments,[29] Article 7 would possess two mechanisms – a preventative one and a sanctioning one. But while it possesses two types of mechanisms, the treaty provision itself is split into three related albeit separate stages.

The first stage, found in Article 7(1) TEU, aims to establish a dialogue with a Member State – in the form of hearings before the Council – *before* a violation of the EU's values occurs.[30] The culmination of Article 7(1) constitutes an official 'warning' by the EU,[31] that the situation in a Member State is concerning and may lead to a violation of the EU's values. Prior to this

[24] Bugarič (n 8) 91, Wilms (n 16) 70.
[25] Wilms (n 16) 70.
[26] Bugarič (n 8) 92. See also Erin K Jenne and Cas Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?' (2012) 23(3) J Dem 147.
[27] Kochenov (n 4) 135.
[28] Three wise men report (n 22) para 117; Bonelli (n 13) 179.
[29] Via the Nice Treaty and later the Lisbon Treaty. See Bonelli (n 13) 180.
[30] See Three wise men report (n 22) para 117; Bonelli (n 13) 179.
[31] Commission, 'Respect for and promotion of the values on which the Union is based' (Communication) COM/2003/606 final, 7; Leonard Besselink, 'The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in Jakab and Kochenov (n 4) 134.

warning, the Council may issue recommendations to the Member State instructing it on how to resolve the problem.

What may follow, is an official denouncement under Article 7(2) TEU, in which 'the existence of a serious and persistent breach by a Member State of the values referred to in Article 2' is established. If this denouncement is made, the third stage would see an imposition of sanctions on the violating Member State, as stipulated in Article 7(3) TEU.

The three stages are related, as they may be initiated progressively, starting with the official warning, progressing through to the denouncement, and ending with sanctions. Furthermore, sanctions under article 7(3) may not be initiated without a prior denouncement under article 7(2).

However, they are separate in that the denouncement itself (Article 7(2) TEU) need not follow the official warning (Article 7(1) TEU), and the sanctions (Article 7(3) TEU) need not follow even if a denouncement is made.[32] This all depends on the political will of the institutions tasked with the enforcement of the mechanism. This separation is possible because Article 7(1) TEU is activated by the Council of Ministers (with the Parliament's consent); Article 7(2) TEU requires a unanimous vote in the European Council (with the Parliament's consent), and the ability to impose sanctions is left *not* to the denouncing body (the European Council), but to the Council of Ministers.

While there are three possible stages, as already acknowledged, they are often grouped into a 'preventative' arm, and a 'sanctioning' arm. The former relating to Article 7(1) TEU, and the latter referring to the combination of Articles 7(2) and 7(3) TEU.

Before we progress to a breakdown of these two mechanisms, it should also be noted that in order to increase the efficacy of the tool and in supporting the provision's *effet utile*, Article 7 was given a very broad scope which would allow the EU to address violations that fell 'outside the scope of EU law'.[33] Simply put, the provision can address violations of the EU's values – such as the rule of law – taking place solely in a domestic capacity. This was crucial for the effective functioning of the mechanism.[34] As highlighted by the Commission, Article 7

[32] Commission Communication (n 31) 4.
[33] Bonelli (n 13) 174; Commission Communication (n 31) 5.
[34] Kochenov (n 4) 138.

had to be applicable even to purely internal situations, as grave violations of the EU's values may 'undermine the very foundations of the Union and the trust between its members, *whatever the field in which the breach occurs*'.[35] Indeed, if the scope of this provision was instead confined to activities falling within the scope of EU law, it would fail to 'address serious breaches of values'.[36] The EU would be unable to consider the cumulative impact of all the violations, instead focusing only on the measures falling within the scope of the EU's acquis. Thus, the severity and systemic nature of these violations would be more difficult to prove, in turn rendering the mechanism too cumbersome, impractical and ineffective to use.

The added effect of this broad scope is therefore that – since all domestic activity falls within the scope of Article 7 – a Member State cannot refute the EU's supervision by claiming that it is acting within a sphere of sole domestic competence or rely on arguments of sovereignty and the need to respect national identity, as would otherwise be required by the Treaties.[37]

2.1.1 Preventative arm

The first mechanism, found in Article 7(1) TEU, is characterised by a 'preventative mechanism (for the determination of a clear risk of a serious breach of EU values, *not followed by any other sanctions*)'.[38] This is a predominantly dialogic mechanism:

> The idea at the basis of the procedure is not to sanction a Member State breaching EU values, but rather to signal the existence of a "risk" for the country in question as well as for the EU as a whole. The finding of a "clear risk of a serious breach" would have the effect of increasing the pressure on the country in question, asking it to take action in order to address the risk of a breach, but would also signal the willingness to work together towards a common solution, rather than punishing and isolating a Member State.[39]

[35] Commission Communication (n 31) 5 (emphasis added); Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3, 5.
[36] Bonelli (n 13) 182. See, in particular, the inability of early infringement proceedings to address the crisis in Hungary. (Section 3)
[37] Bonelli (n 13) 186, Kochenov (n 4) 137, and see also Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141, 144.
[38] Sadurski, 2019 (n 10) 223 (emphasis added).
[39] Bonelli (n 13) 182.

In order to initiate Article 7(1) TEU, first a 'reasoned proposal' must be issued by the Commission, Parliament or a third of Member States, proving that there exists a '*clear risk*',[40] and that this risk was of a '*serious* breach',[41] of the values in Article 2 TEU.

Subsequently, the Member State must be heard before the General Affairs Council. A Member State against which Article 7(1) has been initiated may be called in before the General Affairs Council for a hearing at any time, provided that the incumbent Council Presidency decides to organise such a hearing.[42] These hearings allow the Member States' violations to be brought to light, and therefore allow the Council to become familiar with the situation. The Council may in turn decide to issue recommendations to the Member State (on how to resolve such violations),[43] or, at the final stage, issue an official warning, that a 'clear risk of a serious breach' is present. Both options follow the same procedure for adoption and require a four-fifths majority in the Council (22 out of 27 Member States)[44] after the European Parliament gives its consent. The situation in the Member State would then have to be 'regularly' reviewed by the Council,[45] and it could lead to an activation of Article 7(2) TEU, but it is important to note that the 'two procedures… are separate, and a previous activation of Article 7(1) TEU is not an essential requirement for the second decision under Article 7(2)'.[46]

Therefore, simply put, the preventative arm of Article 7 constitutes 'a warning signal to an offending Member State before the risk materialises'.[47] It is to signal to the Member State that the EU is officially concerned with the situation transpiring. It is a monitoring mechanism, which should lead to 'constant surveillance' so that a 'clear risk' does not evolve into an actual breach.[48] The hope is that the concentrated pressure of various national governments in the

[40] Namely, the risk must 'have actually materialised' (Commission Communication (n 31) 8).
[41] Meaning that both the 'purpose' and 'result' of the measures by the Member State must have the aim of violating the EU's values (ibid and see Bonelli (n 13) 184).
[42] Article 237 TFEU. See also European Parliament (Parliament), 'Resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP))', P9_TA(2021)0287, para 5.
[43] See Bonelli (n 13) 181. Kochenov (n 4) 138-139.
[44] Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (*EC Press Corner*, 20 December 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367> accessed 24 August 2021
[45] Article 7(1) TEU.
[46] Bonelli (n 12) 182-183.
[47] Commission Communication (n 30) 7.
[48] ibid.

Council and various EU institutions will be sufficient to convince the Member State concerned to resolve the problem before further action needs to be taken. The mechanism is therefore purely preventative and dialogic – it does not lead to or foresee the introduction of any sanctions.

2.1.2 Sanctioning arm

Articles 7(2) and 7(3) TEU are separate steps, and the conclusion of the former does not automatically lead to the latter – this separation being possible due to the fact that the determinations are made by two different bodies[49] – but taken together they represent the sanctioning arm of Article 7. This mechanism is reserved for instances where a Member State has seriously and persistently violated the EU's values.[50]

Article 7(2) TEU may be initiated by the Commission or one third of Member States.[51] Subsequently, the Member State concerned may 'submit its observations' to the European Council, after which – given Parliament's consent[52] – the European Council would vote on the existence of a 'serious and persistent breach' of the EU's values *by unanimity.*[53] If unanimity is attained, this would constitute a denouncement, signalling that a Member State has been violating the EU's values. By itself, this amounts to no more than condemnation. However, this condemnation is an essential precondition for the imposition of sanctions under Article 7(3) TEU.

Under Article 7(3) TEU, the Council may impose sanctions on a Member State against which the Article 7(2) TEU denouncement had been made, voting by a qualified majority.[54] These sanctions may include the suspension of a Member States' voting rights,[55] but they could also

[49] See Bonelli (n 12) 185.
[50] Kochenov (n 4) 141. See also Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: what it is, what has been done, what can be done' (2014) 51(1) CML Rev 59.
[51] The European Parliament is unable to do so; it may only encourage the eligible institutions to do so. Parliament, 'Rules of Procedure' (8th parliamentary term, January 2017) (hereinafter "Rules of Procedure"), Rule 83. See Besselink (n 31) 132; Bonelli (n 12) 184; Kochenov (n 4) 140-141.
[52] Rules of Procedure (n 51) and Article 354 TFEU. See also Kochenov (n 4) 144; Bonelli (n 12) 184.
[53] Namely, it is to be determined that the breach 'lasts some time' (persistence), taking into account its 'purpose' and 'result' (seriousness). See Commission (n 30) 8; Bonelli (n 12) 184.
[54] The voting requirements in Article 7 exclude the Member State against which the vote is taken (Article 354 TFEU). See Besselink (n 31) 132; Kochenov (n 4) 143.
[55] Article 7(3) TEU; Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 TCLR 35, 41.

concern any 'right deriving from the application of the Treaties'.[56] This is because Article 7(3)'s language is not exhaustive, and refers to the suspension of '*certain* of the rights deriving from the application of the Treaties'.[57] It is therefore possible to argue that the sanctions which may be imposed are broad, and '[l]ess intrusive measures are certainly foreseeable… [such as] the use of financial sanctions or the suspension of EU structural funding. The provision leaves a broad discretion to the Council in this sense.'[58]

The procedural thresholds of the sanctioning arm of the mechanism are therefore far more demanding than the preventative arm, as it requires unanimity in the European Council without which sanctions may not be adopted (even if, for the imposition of sanctions, *only* a qualified majority is required).

Finally, as stipulated in Article 7(4) TEU, these sanctions may be altered or revoked, also by qualified majority in the Council if the situation in the Member State improves.[59]

In sum, the sanctioning arm of Article 7 constitutes an escalation in the EU's rule-of-law-response-toolkit, even if it is a mechanism with an extremely high procedural threshold, requiring unanimity in the European Council before sanctions may begin to be considered. The EU's Member States must be conscious of the fact that *if* they violate the EU's values, they may face a series of sanctions. In theory, this acts as a deterrent against such action.

2.2 Second implication: Article 7 as a 'nuclear' tool

Despite the introduction of a weaker non-sanctioning provision into Article 7, and the fact that the sanctions imposed on Austria were not formally EU measures, Article 7's reputation was tarnished.[60] The mechanism was later famously termed by Commissioner Barroso as a 'nuclear option'.[61] A term which stuck; it convinced successive Commissioners to refrain from

[56] Gábor Halmai, 'How the EU Can and Should Cope with Illiberal Member States' (2018) 38(2) Quaderni Constituzionali 313, 334; Besselink (n 31) 129-131.
[57] Article 7(3) TEU (emphasis added). See Besselink (n 31) 129; Kochenov (n 4) 142.
[58] Bonelli (n 12) 185. See also Tomas Dumbrovsky, 'Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst under Article 7 TEU' (2018) EUI Working Papers RSCAS 2018/12 <http://hdl.handle.net/1814/52925> accessed 24 August 2021. cf Bugarič (n 8) 98; Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1082, 1084-1085.
[59] Article 7(4) TEU.
[60] See Wilms (n 16) 70, Kochenov (n 4) 135-136.
[61] José Manuel Durão Barroso, 'State of the Union Address 2013', Strasbourg, 11 September 2013, Doc SPEECH/13/684.

using it against Hungary, when the crisis there started in 2010.[62] Thus, Article 7 became associated with the improper use of sanctions; it was perceived as an 'unusable' tool.[63] The belief was that Article 7 could not be used as it was simply too 'toxic'; and its effects would be 'too devastating to make it practicable.'[64]

However, this attitude towards Article 7 (and its connection to the Haider affair) is deeply unfounded.[65] It completely ignores the introduction of the preventative arm, which by itself could not lead to sanctions. Furthermore, each stage of Article 7 is divided and separate – even the conclusion of the preventative arm would then require a separate initiation of Article 7(2) TEU, which would require the unanimity of the European Council even before a *separate* institution would be able to impose sanctions. Those sanctions – contrary to the unfounded nuclear myth – need not lead to the nuclear suspension of voting rights, with the Council possessing complete discretion over which sanctions to introduce.[66] Another convincing argument states that refusing to initiate Article 7 against Hungary (and later Poland), based on the Austrian experience, is unfounded considering that these States 'have a sustained track record… [with] ample evidence of actual, repeated and systemic rule of law violations', and the situation therefore is completely different from Austria where no actual violations had occurred.[67]

Nonetheless, while the idea of Article 7 as 'nuclear' is now increasingly acknowledged as unfounded, the point remains – the 'nuclear' perception of Article 7 meant that the tool would not be used, thereby depriving the EU from being able to address the crisis developing in Hungary in a timely manner.

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[62] See Bugarič (n 8) 94-95.
[63] Müller (n 58) 17. See Commission Communication (n 30) 12; Besselink (n 31) 134-135; Kochenov and Pech 2016 (n 1) 1067; Frans Timmermans, 'The European Union and the Rule of Law' (Conference on the Rule of Law, Tilburg University, 31 August 2015).
[64] Kochenov (n 4) 132, 136.
[65] Kochenov and Pech 2016 (n 1) 1067; Kochenov (n 4) 136.
[66] Bonelli (n 12) 185.
[67] Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*Verfassungsblog,* 23 December 2017) <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> accessed 24 August 2021; Kochenov and Pech 2016 (n 1) 1067-1068.

Before progressing, we may also point to a few other reasons as to why Article 7 was perceived as unusable, which have possibly stemmed from its perception as a nuclear tool.[68] First, the mechanism was viewed as impossible to use, because it possesses high procedural thresholds such as the four-fifths supermajority required to conclude the preventative arm or the unanimity requirement under Article 7(2) TEU.[69] The Commission may have therefore been reluctant to initiate either of the mechanisms owing to the fact that if insufficient support from the States in either council was present, the tool would fail thus reinforcing the perception of Article 7 as ineffective, and potentially validating the behaviour of violating Member States.[70] It was also problematic that the operative decision-making under Article 7 rests in the hands of intergovernmental institutions, which cannot be compelled to vote on the existence of a 'clear risk of a serious breach', a 'serious and persistent breach' or as to the imposition of sanctions – there was therefore no guarantee that even if the procedure was initiated, that it would reach a conclusion.[71]

Therefore, while the introduction of Article 7 marked a positive development in the EU's enforcement toolkit, theoretically equipping it with a tool for the enforcement of its values, the Haider affair and the subsequent concerns stemming from it had seemingly closed the door to the possibility of utilising the tool when arguably it was necessary.

3. Thinking up alternatives: the failure of the infringement's procedure

With Article 7 seen as unusable, the EU still had the infringement's procedure it could rely on against Hungary.[72] This too, however, proved inadequate, mostly owing to its scope which was 'too narrow to address the structural problem which persistently noncompliant Member States pose'.[73] Indeed, 'the Commission has construed its powers as confined strictly to the areas where concrete, specific provisions of the EU's acquis have been breached.'[74] Since the

[68] Sadurski, 2019 (n 10) 223-224; Wilms (n 16) 74.
[69] Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512, 517.
[70] Wilms (n 15) 68-69.
[71] Kochenov and Pech 2015 (n 69). See Case T-337/03 Bertelli Galvez v Commission EU:T:2004:106, [2004] ECRII-1041, para 15.
[72] Kochenov and Pech 2015 (n 69) 517.
[73] Halmai (n 56) 316; Bugarič (n 8) 96-97; Kochenov and Pech 2016 (n 1) 1065; cf Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Closa and Kochenov (n 8) 66.
[74] Kochenov and Pech 2016 (n 1) 1065. See also Lavelle (n 55) 46.

EU lacks a competence over the structuring of national justice systems, the Commission initially felt unable to bring infringement actions for 'governmental attacks on courts'[75] Accordingly, in its early jurisprudence regarding Hungary, where the age of retirement for judges was lowered, thereby 'remov[ing] from office the most senior ten percent of the judiciary, including a lot of court presidents, and members of the [SC]', the action for infringement brought by the Commission was based on age discrimination.[76] The problem of such approaches, even where a violation of EU law is found, is that they do not capture the essence of the problem, which is the undermining of checks and balances, and are therefore unable to 'impose effective remedies'.[77]

Fortunately, the approach of the CJEU has constantly been improving in the context of the rule of law crisis. Indeed, while the competence over the structuring of a national justice system remains with Member States, meaning that the EU lacks a legal basis to act in this sphere,[78] the CJEU has since extended its jurisdiction. It has *inter alia* highlighted that Member States – even when exercising their sole competences – must comply with their obligations in EU law, which include the provision stipulated in Article 19(1) TEU that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[79] Such 'effective legal protection' is impossible to ensure if the judiciary is not independent or impartial.[80] Accordingly, the CJEU has held that Member States must ensure the independence of their judiciaries for the proper functioning of EU law. In other words, the Court has interpreted teleologically a somewhat procedural provision found in Article 19(1)

[75] Pech and Scheppele (n 35) 13.
[76] Halmai (n 56) 316.
[77] Kochenov and Pech 2015 (n 69) 520; Kochenov and Pech 2016 (n 1) 1068-1069; and Bugarič (n 8) 85, 95-96; Lavelle (n 55) 47; Pech and Scheppele (n 35) 13.
[78] See Article 5(1)-(2) TEU.
[79] See Case C-791/19 Commission v Poland (disciplinary regime for judges) EU:C:2021:596, paras 50-53, 56, 95, 136. See also Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 YB Eur L 3, 12, 17, 19.
[80] Case C-791/19 (n 79) para 57. See also Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, paras 32-37.

TEU to create an obligation under EU law requiring Member States to ensure independence of their judiciaries, thereby protecting the rule of law.[81]

Despite the recent progression in the CJEU's jurisprudence however, the point remains that initially this tool was too narrow to effectively capture the cumulative effects of various legislative measures aimed at dismantling domestic checks and balances. The mechanism could not address the problem at hand directly, and therefore appropriate remedies could not be issued. The infringements procedure was therefore perceived as incapable of adequately addressing the rule of law crisis.[82]

Thus, as the rule of law crisis in the EU unfolded, it became apparent that neither tool was able to adequately address rule of law backsliding. The backsliding in Hungary started in 2010 with the election of Victor Orban's Fidesz party, but neither Article 7 TEU nor infringements proceedings were able to sufficiently address the dismantling of checks and balances and the assault on the rule of law there. The EU therefore resorted to the creation of the RLF.[83]

4. The Rule of Law Framework introduced

Due to the inability of the EU's mechanisms to address the emerging rule of law crises, calls arose for 'a new and more effective mechanism to safeguard values in Member States'.[84] The mechanism created in turn – the RLF[85] – was aimed at bridging the gap between these two mechanisms, with the hope that it would succeed where the previous ones failed.[86] Indeed, the tools had some positive aspects which the RLF would attempt to replicate. Infringement proceedings could not be blocked by Member States, and could be initiated relatively easily,

[81] Aleksandra Kustra-Rogatka, 'The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism' (*Verfassungsblog,* 14 November 2019) <https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/> accessed 24 August 2021. See also, Kochenov (n 4) 146-148; Lavelle (n 55) 46; Gábor Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) 11 HJRL 171, 179.
[82] Halmai 2019 (ibid) 176; Scheppele, Kochenov and Grabowska-Moroz (n 79).
[83] Bonelli (n 12) 189-190.
[84] Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission and to the Presidency of the Council, 6 March 2013; Bonelli (n 12) 190. See also Robert Grzeszczak and Stephen Terrett, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience' (2018) 69 NILQ 347, 357.
[85] Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM/2014/0158 final.
[86] Bonelli (n 12) 190; Kochenov and Pech 2015 (n 69) 531.

with the Commission bringing the case to the CJEU but were unable to capture and address the cumulative effect of the backsliding measures, as they focused specifically on violations of the EU's acquis. Article 7, on the other hand, possessed a sufficiently broad scope but was too cumbersome and politically costly to utilise. The RLF therefore bridged the gap between the broad scope but difficult to utilise Article 7, and the narrow scope but comparatively easy to initiate infringement's procedure. The RLF would be completely controlled by the Commission, thereby removing the issues associated with Article 7's procedural thresholds, and it would address 'systemic threats' to the rule of law, before they turned into a 'clear risk of a serious breach' as required by Article 7(1) TEU, thereby ensuring the tool was not confined to the EU's acquis.[87] The new mechanism was created unilaterally by the Commission through a communication, a non-legally binding instrument which amounted to the creation of a purely dialogic monitoring tool. Accordingly, it did not amount to an illegal extension of the Commission's powers, which would have otherwise required a Treaty amendment, as the need to carry out a degree of monitoring is inherent in the preventative arm of Article 7(1) TEU, which requires the initiating body to produce a '*reasoned* proposal'.[88]

Before we proceed to an explanation of how the tool was to function, the two goals of the mechanism will be clarified.[89] The mechanism's main function was to 'to prevent perceived systemic threats to the rule of law from escalating.'[90] This was to be done through a process of 'structured dialogue' between EU institutions and a Member State who appears to be threatening the rule of law, thereby serving as an 'early warning tool'.[91] This structured dialogue is reflected in the RLF's three stages. It was hoped that this dialogue would be sufficient to encourage the Member State to resolve the violations itself – before any further supranational intervention was necessary.

[87] Commission Communication 2014 (n 85) 6.
[88] Kochenov and Pech 2015 (n 69) 525 (emphasis added). cf Council, 'Commission's Communication on a new EU Framework to Strengthen the Rule of Law' (Opinion of the Legal Service) Brussels, 27 May 2014, Doc 10296/14. See also Grzeszczak and Terrett (n 84) 35, Armin von Bogdandy, Carlino Antpöhler, and Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in András Jakab and Dimitry Kochenov (n 4).
[89] See Wilms (n 16) 76; Sadurski, 2019 (n 10) 214.
[90] Kochenov and Pech 2016 (n 1) 1066.
[91] Kochenov and Pech 2015 (n 69) 521-522; Halmai (n 56) 316-317. See also Commission, 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' (Communication) COM/2019/163 final.

The second and subsidiary goal of the RLF was to precede and facilitate the activation of Article 7.[92] Indeed, the Commission's ability to assess the situation in a Member State aimed to 'resolve future threats to the rule of law in Member States *before* the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.'[93] But it was to be without prejudice to the activation of other tools. It was therefore to compliment the activation of infringements or Article 7; it is for this reason that the RLF also became known as a 'pre-Article 7' procedure, or a 'pre-preventative procedure'.[94] The Commission's findings under the RLF were to strengthen the possibility of activating Article 7(1) TEU.

With this in mind we may consider the three stages of the RLF which aimed to prevent a deterioration through 'structured dialogue'. It should be noted that each stage of the RLF is 'purely discretionary' for the Commission.[95] The Commission decides when and if to initiate the mechanism, and how exactly it should escalate its response with each subsequent step.

4.1 Stage 1: Assessment: Informal Dialogue and Opinion

In the first stage, the Commission engages in a 'preliminary assessment' of the situation in the Member State, to see if a 'systemic threat to the rule of law' exists.[96] The Commission will look for violations which are not sporadic or one off violations,[97] but situations where *inter alia* 'the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.'[98] Accordingly, the Commission will collect information and engage in 'confidential and informal' dialogue with the Member State over the perceived violation.[99]

[92] Kochenov and Pech 2015 (n 69) 521-522.
[93] Commission Communication 2014 (n 85) 4.
[94] Hillion (73) 78-79.
[95] Bonelli (n 12) 192.
[96] Commission Communication 2014 (n 85) 7-8.
[97] ibid 6.
[98] ibid 6-7. For a critique of the substantive criteria of the RLF see, e.g., Bonelli (n 12) 191, Kochenov and Pech 2015 (n 69) 523-524, Sadurski, 2019 (n 10) 217-218.
[99] The RLF officially states that dialogue begins with the issuing of an Opinion. However, as Bonelli highlights, the Commission's informal dialogue may begin even before the issuing of the Opinion (Commission Communication 2014 (n 85) 7-8 cf. Bonelli (n 12) 192).

If upon this assessment the Commission believes a threat to the rule of law exists, it will elaborate its concerns by issuing a 'rule of law opinion'.[100] The content of the Opinion as well as that of the informal dialogue remains confidential to 'facilitate quickly reaching a solution'.[101]

4.2 Stage 2: Recommendation

If the Member State does not adhere to the Opinion issued by the Commission, it will in turn issue a recommendation.[102] Under this second stage, the Commission clarifies how the Member State is posing a threat to the rule of law, provides specific guidelines on how to resolve the problem, giving the Member State a deadline in which it must respond. This text is 'made public by the Commission'.[103]

4.3 Stage 3: Follow-up

Lastly, if the recommendation is ignored (or there is continued insufficient response by the Member State concerned) a follow-up process is engaged in by the Commission, whereby it will 'monitor' the response of the Member State concerned with the previously issued recommendation.[104]

The Communication introducing the RLF stipulated that:

> This monitoring *can* be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation.[105]

If this dialogue failed, and there is 'no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU'.[106]

At this stage we may make three comments on the enforcement capacity of the tool.

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[100] Commission Communication 2014 (n 85) 7.
[101] ibid 8.
[102] ibid.
[103] ibid.
[104] ibid.
[105] ibid. (emphasis added).
[106] ibid.

First, the mechanism indicates that dialogue may be continued with the Member State as a form of follow-up, but as we will see in the following chapter, Poland's refusal to adhere to the Commission's original recommendation was followed-up by three other recommendations. The Commission has consequently been criticised for issuing 'ad hoc recommendations' which were not explicitly foreseen in the original mechanism, thereby delaying meaningful escalation of the EU's response.[107]

Secondly, unlike the infringement's procedure or the sanctioning arm of Article 7, this is a soft law tool.[108] It does not possess a legally binding element, viz., it lacks an enforcement mechanism for non-compliance with the Commission's recommendations.[109] The Member State in question may not, for example, be brought before the CJEU for its failure to adhere to the Commission's recommendations. Moreover, the RLF does not foresee the imposition of sanctions as it is a purely dialogic and diplomatic mechanism.

Thirdly, there was no obligation on the Commission to initiate Article 7(1) TEU. This omission was perhaps aimed at ensuring that this mechanism would be as non-confrontational as possible. But as will be discussed in the context of the mechanism's failure, this lack of an automatic connection to Article 7 may be perceived as problematic, as it allowed the Commission to delay the activation of Article 7.[110]

5. Conclusion

The introduction of Article 7 marked a crucial stage for the EU, as it possessed for the first time a tool aimed specifically at the protection of its values. It possesses the broadest scope of any EU tool, able to address any violation to the EU's values. It allows for constant monitoring and surveillance; it allows the Council (under Article 7(1) TEU) and the European Council (through its denouncement under Article 7(2) TEU) to induce political pressure upon a State to halt its violations of the EU's values; and it may ultimately lead to the imposition of

[107] Kochenov (n 4) 140.
[108] See Chapter 3, section 2. See also Artur Nowak-Far, The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications' in Von Bogdandy (n 4) 320.
[109] Soft law in this thesis will be distinguished from hard law based on the differences in their enforcement capacity (Chapter 3 Section 2.1). See also Matej Avbelj and others, 'EU Soft Law in the EU Legal Order: A Literature Review' (SoLAR Working Paper Forthcoming) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629> accessed 24 August 2021.
[110] See Chapter 3 Section 3.2. See also Kochenov and Pech 2016 (n 1) 1067.

sanctions as the ultimate deterrent. It is therefore *prima facie* a powerful tool, capable of defending the EU's values. It can theoretically dissuade violations through political pressure and/or the threat (and actual imposition) of sanctions. It also allows the EU to preserve itself by isolating a Member State (by suspending its voting and membership rights) so that its violations may not harm the EU's functioning.[111] However, following the Haider Affair and the rise of scepticism surrounding the tool's use, at a time when rule of law backsliding first started with Hungary, the EU seemed incapable of addressing the threat as it refused to use the tool tailored for this exact situation. Indeed, despite the introduction of the weaker, preventative arm, the mechanism was still perceived as unusable and was not activated against Hungary when the situation there begun to develop in 2010.

Instead, the EU resorted to infringement proceedings which proved incapable of addressing backsliding due to their narrow scope. In response, in the belief that the EU's other tools were incapable of resolving the threat posed by rule of law backsliding, the Commission created the RLF. But despite the introduction of this new tool in 2014 it still was not used against Hungary, this is so despite clear signs of the rule of law being undermined.[112] Instead, when the EU had been faced with another backsliding State in the form of Poland, the Commission decided to act only then – not against the original violator, but against this new offender. Therefore, in early 2016 the RLF was used against Poland (and *only* against Poland), and not against Hungary, the Member State for which the mechanism was devised. In practice, as the following chapter will illustrate, both the RLF and the subsequently activated Article 7 proved ineffective at resolving backsliding in Poland.

Thus, while the EU's apparent search for enforcement tools capable of protecting its values reflects an acknowledgment of the threat posed by their violations, it would appear that once activated, the tools created are powerless against openly defiant States. It appears that the EU was willing to enforce its values, but that it was simply unable to do so.

Consequently, knowing the context of these tools, and how they were to function, we may proceed to an assessment of how they were used against Poland and begin to consider why exactly they were unable to address the problems they were designed for.

[111] Müller (n 36) 114.
[112] See e.g., Halmai (n 56) 173; Pech and Scheppele (n 35).

Chapter 2: The Tools in Practice

1. Introduction

The EU first responded to the backsliding in Poland through the RLF soon after the electoral victories of the PiS government and their almost immediate attack on the judiciary. The mechanism was initiated by the Commission in January 2016 and the dialogue under the mechanism lasted until December 2017 when the Commission ultimately conceded that despite its four recommendations and attempts at dialogue, Poland was uncooperative and the threat to the rule of law was constantly increasing.[1] With the failure of the RLF, the Commission (rightly) felt compelled to activate Article 7(1) TEU. However, despite the initiation of the mechanism, nothing was achieved. The rule of law in Poland continued to be violated as if nothing happened,[2] and Minister Czaputowicz even described the tool as 'dead'.[3] There is some truth to his derogatory comment as the Council has failed to make use of the tools available to it under Article 7's preventative arm: the hearings held have been infrequent and have illustrated the insignificant support from the Member States for the procedure, no recommendations have been issued and the mechanism has not been concluded, viz., there has not been a vote over the existence of a 'clear risk of a serious breach' in Poland. This being so despite a constant deterioration in Poland which has seen its internal rule of law violations produce very real and external problems for the EU, and which

[1] Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (Reasoned Proposal)' COM/2017/835 final, paras 171, 173-175.

[2] See Section 3.2 in this chapter. For more recent signs of deterioration in Poland, see also: Commission, '2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland' SWD/2020/320 final (hereinafter "Commission 2020"); Commission, '2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland' SWD/2021/722 final (hereinafter "Commission 2021").

[3] Polsat News, '"Artykuł 7 jest martwy; Komisja Europejska przegrała" [Article 7 is dead; the European Commission lost]' (*PolsatNews* (author tr), 11 December 2018) <www.polsatnews.pl/wiadomosc/2018-12-11/czaputowicz-kosiniak-kamysz-goscmi-wydarzen-i-opinii-transmisja/> accessed 20 August 2021.

arguably puts it firmly into the 'serious and persistent breach' category.[4] It would thus seem that at a time when the EU is facing one of its most serious challenges, Article 7 TEU – the EU's prime tool for the protection of its values – appears redundant.

In order to illustrate how these tools have turned out in practice, this chapter's assessment will be provided in two parts.

First, the EU's initial response to the crisis in Poland through the RLF, between January 2016 and December 2017 will be considered. The section will consider the circumstances surrounding each of the four recommendations issued by the Commission, in order to highlight how the Commission's pressure and attempts at dialogue were ignored by Poland. Thus, while the Commission attempted to prevent further deterioration through dialogue, Poland continued to subordinate the judiciary and entrench itself in power.

Secondly, given that only the preventative arm of Article 7 has been initiated, the tool's operation in practice will be considered from December 2017 onwards. In order to illustrate the mechanism's failure, it will first be highlighted how the implementation of the mechanism in 2018 (its early stages) resulted in the organisation of three hearings – the format of which was deficient and – which failed to produce any change or exert any substantial pressure on Poland. Secondly, it will be highlighted how the Council had seemingly lost interest with the proceedings, as no hearing was held from December 2018 until June 2021, this being so despite Poland's continuous deterioration. Accordingly, it will be argued that the Council has failed to utilise Article 7(1) TEU appropriately: it failed to illustrate adequate concern with the crisis in 2019 and 2020 by failing to hold hearings, and to this day it has failed to exert any meaningful pressure on Poland through its recommendations or its official warning.

With the RLF seemingly incapable of halting violations and with Article 7(1) TEU utilised ineffectively, the situation in Poland has worsened. The EU has *prima facie* been incapable of resolving the threat it is increasingly facing via rule of law backsliding.

[4] Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) 114.

2. The Rule of Law Framework: January 2016 – December 2017

After securing the post of the President in August 2015, and the Parliament in October 2015, PiS controlled the executive and legislative branches. The regime subsequently engaged in a crusade to subordinate the judiciary, and in their first two years in power this was largely achieved.[5] This assault came in two phases.[6] In the first phase, PiS disabled effective judicial review and turned the CT into a supporter of the regime. In the second phase, no longer concerned with scrutiny by the CT, the PiS government began to pass substantive legislation affecting the composition and functioning of ordinary courts and the SC. As the situation in Poland was deteriorating, the Commission attempted to engage in dialogue through the RLF. However, while the original Communication stated that the dialogue would be 'structured', in practice the Commission appeared to change the way it enforced its creation.[7] The Communication establishing the RLF assumed that non-compliance with informal dialogue would lead to the issuing of an Opinion, followed by a recommendation, and finally to the follow-up stage and a possible activation of Article 7. Instead of following this process, the Commission issued three additional 'ad hoc' recommendations after the first one was not complied with. Thus, instead of escalation to Article 7 following non-compliance with the first recommendation, we instead saw protracted and ineffective dialogue. Indeed, after each substantive rule of law breach by Poland, the Commission issued a recommendation, which Poland proceeded to denounce, criticise, and ignore.

In order to illustrate the ineffectiveness of the RLF in constraining Poland's backsliding, this section will consider the circumstances surrounding each of the four recommendations.

2.1 Dialogue initiated: informal dialogue, Opinion and the first recommendation

The newly elected government's first major assault on the rule of law came in the form of undermining the operation of the CT, whose role is to 'adjudicat[e]… on the Constitutionality

[5] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3, 14-21.

[6] Matteo Bonelli, 'A Union of Values: Safeguarding Democracy, the Rule of Law and Human Rights in the EU Member States' (PhD thesis, Maastricht University 2019) 277; Marcin Matczak, 'Poland: From Paradigm to Pariah? Polish Constitutional crisis – facts and interpretations' (University of Oxford, 8 March 2018) <https://www.fljs.org/poland-paradigm-pariah> accessed 24 August 2021.

[7] Dimitry Kochenov and Laurent Pech, 'Better Late than Never: On the European Commission's Rule of Law Framework and Its First Activation' (2016) 54 J Common Mkt Stud 1062, 1066-1067, 1070; Kochenov (n 4) 139.

of legislation.'[8] The regime had to dispose of any meaningful 'procedural and institutional avenue to enforce constitutional rules' as otherwise any plans to entrench themselves in power would be short-lived.[9] The regime first incapacitated the CT with legislation aimed at affecting its functioning, and it began to unconstitutionally staff the CT with its supporters with the aim of changing its composition.[10]

The CT's functioning was affected by a series of laws aiming to preoccupy the Court and create a backlog in cases, so that it would not engage in scrutinizing other, substantive, PiS legislation for compatibility with the Constitution.[11] For instance, one such law stipulated that the CT would have to handle cases in chronological order, thereby shielding newer laws from scrutiny.[12] While the CT ultimately decided these laws to be unconstitutional,[13] they did – as planned – slow down the work of the Court, and in any case they were not enforced by the PiS government which found them improperly passed, citing as an excuse the fact that the CT had not adhered to the new rules on its functioning.[14]

PiS also began its subordination of the CT via unlawful appointments.[15] In order to understand how this took place, it should be noted that the Sejm (lower house of Parliament) is responsible for selecting candidates to the CT, which then must be approved by the President. The President's role, in this context, is not voluntary but obligatory. The President must swear in the judges legitimately appointed by the legislature.[16] Bearing this in mind, one should also be aware that Andrzej Duda – aligned with PiS – won the Presidential elections in August 2015, prior to the PiS government's parliamentary election victory in late October 2015. The

[8] Commission 2020 (n 2) 2; Polish Constitution, Article 188; Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 61.
[9] Tomasz Tadeusz Koncewicz, 'Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe' (*Verfassungsblog*, 19 July 2017) <https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/> accessed 23 March 2020. See also Sadurski (n 8) 2-3, 50-52, 58; Robert Grzeszczak and Stephen Terrett, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience' (2018) 69 NILQ 347, 348.
[10] Sadurski (n 8) 58-95.
[11] ibid 70-75.
[12] Commission, 'Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland' [2016] OJ L 217, para 26 (hereinafter "Recommendation 1 2016"). See Sadurski (n 8) 72.
[13] See Constitutional Tribunal, Judgment of 9 March 2016, K 47/15. See also Sadurski (n 8) 71ff.
[14] Recommendation 1 2016 (n 12) paras 18-24; Sadurski (n 8) 74.
[15] Recommendation 1 2016 (n 12) paras 3-17; Sadurski (n 8) 61-70.
[16] See Constitutional Tribunal, Judgment of 3 December 2015, K 34/15.

previous government, in anticipation of a potential electoral loss, appointed earlier in October five judges to the CT. However, only three out of the five appointments were lawful as the appointments to the other two judicial posts were made pre-emptively, before the terms of the two judges to-be-replaced had expired. It is here that the problem arises: the new President refused to swear in all the five judges appointed by the previous government, and when the PiS government came into power it passed a resolution finding all the appointments illegitimate and proceeded to appoint and swear in overnight their own five appointees.[17] Thus, simply put, three out of the five newly appointed judges (the so-called 'quasi-judges') were appointed unlawfully as they were appointed to judicial posts which had already – lawfully – been filled.

Simply put, in the early stages the regime slowed down the functioning of the CT to shield itself from scrutiny, it refused to enforce crucial decisions of the CT which challenged their assault on it, and it began to amend its composition.[18]

The Commission responded swiftly.[19] It communicated its concerns over the unlawful appointments as soon as they were made in December 2015, and it requested that PiS refrain from passing legislation undermining the CT's functioning.[20] With PiS continuing to amend the functioning of the CT, and ignoring the rulings of the CT, the RLF was officially initiated on the 13th of January 2016, following which the Commission attempted to engage in informal dialogue with Poland via *inter alia* country visits.[21] However, there was no progress and so

[17] The then-still-independent CT ruled in a series of cases that three out of the five appointments were made lawfully and that the President was under an obligation to swear in judges lawfully appointed by the legislature, (K 34/15 (n 16)) and that the new government had no legal basis in appointing CT judges to posts which were already lawfully filled. (Constitutional Tribunal, Judgment of 9 December 2015, K 35/15) These judgments were not complied with by the government. See Sadurski (n 8) 63.

[18] Recommendation 1 2016 (n 12) para 2.

[19] For an assessment, see Laurent Pech, 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?' <https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/> (*Verfassungsblog,* 31 October 2016) accessed 12 November 2020.

[20] Letter of the Commission to the Polish Government, 23 December 2015, quoted in Recommendation 1 2016 (n 12); Bonelli (n 6) 281.

[21] Frans Timmermans, 'Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016', Brussels, 13 January 2016, Doc SPEECH/16/71; Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> accessed 25 August 2021; Sadurski (n 8) 218; Bonelli (n 6) 282.

the Commission decided to ultimately issue an Opinion on the 1st June 2016.[22] The Opinion *inter alia* highlighted the threat to the rule of law posed by the undermining of judicial review – something which the regime's measures had clearly attempted to achieve.[23] The Opinion therefore requested Poland to amend legislation on the CT's functioning, to enforce and respect the decisions of the CT, and to replace the quasi-judges with the judges appointed lawfully by the previous government.[24] However, both the informal dialogue and the Opinion which followed 'led to nothing.'[25]

The Commission therefore proceeded to issue a recommendation on the 27th July 2016.[26] In it, the Commission largely reiterated its concerns and requests from the Rule of Law Opinion,[27] concluding that the circumstances and events in Poland represented a 'systemic threat to the rule of law'.[28] Poland was given three months to respond.

On the 27th October 2016, the Polish government responded, in a way which would 'prefigur[e] the responses to all subsequent recommendations: it was heavy-handed, full of self-righteous outrage, and made no concessions whatsoever to any specific criticisms.'[29] Witold Waszczykowski, the Minister of Foreign Affairs *inter alia* denounced the Commission's 'interferences into Poland's internal affairs', arguing them to be in violation of 'objectivism… respect for sovereignty, subsidiarity and national identity'.[30] He described the recommendation as 'an expression of incomplete knowledge about how the legal system and the [CT] operate in Poland'. Due to this alleged ignorance, he concluded that the recommendation was 'groundless', and that the Commission's assessment of the CT could not 'form the basis for claiming that there is a systemic threat to the rule of law in Poland.'

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[22] Commission, 'Rule of Law Opinion regarding the Rule of Law in Poland', Brussels, 1 June 2016 (not published). Text available curtesy of Laurent Pech, 'Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland' (*EU Law Analysis,* 19 August 2016) <https://eulawanalysis.blogspot.com/2016/08/commission-opinion-of-1-june-2016.html> accessed 24 August 2021. (hereinafter 'Rule of Law Opinion'); Bonelli (n 6) 282.
[23] Rule of Law Opinion (ibid) paras 79, 85; Bonelli (n 6) 283.
[24] See Rule of Law Opinion (ibid) para 52.
[25] Sadurski (n 8) 219; Bonelli (n 6) 284.
[26] Recommendation 1 2016 (n 12).
[27] Bonelli (n 6) 284.
[28] Recommendation 1 2016 (n 12) para 72.
[29] Sadurski (n 8) 219-220.
[30] ibid; Minister of Foreign Affairs (Poland), 'A statement on the Polish government's response to Commission Recommendation' (Warsaw, 27 October 2016).

While Poland expressed its readiness to engage in dialogue with the Commission – as it did in all of its responses to the Commission – the tone of its response to the EU's attempts at dialogue was not subtle. Poland would not cooperate.[31]

One would therefore be excused for thinking that, due to this open hostility to the Commission's recommendation, the Commission should have escalated its approach and proceeded to initiate Article 7(1) TEU[32] – Poland was blatantly not willing to cooperate, and the events in Poland, in the words of the Commission, did indicate 'a systemic threat to the rule of law'. Instead, however, the Commission decided to proceed with more dialogue. Three more recommendations would follow, and the hostile and uncooperative response from Poland would not subside.

2.2 Dialogue continued: the second recommendation

The regime continued its subordination of the CT and by the end of 2016 managed to turn it into an active aide of the government. The Commission's recommendation had amounted to nothing.[33] We may note in particular that PiS further amended the CT's functioning in November and December 2016. The new legislation *inter alia* established the post of an acting First President of the CT – a post unforeseen in the Constitution – appointed by the President of the Republic, who would fulfil the functions of the First President of the CT until a new appointment had been made. The acting First President would also 'lead the new selection process'.[34] The law also required the participation of the quasi-judges in the election process of the First President of the CT, thereby arguably rendering it 'unconstitutional'.[35] It was according to this constitutionally-questionable procedure that Julia Przyłębska was first appointed as the acting First President, and subsequently, on the 21st of December 2016, as the First President of the CT.[36]

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[31] Konrad Niklewicz, 'Safeguarding the Rule of Law within the EU: Lessons from the Polish Experience' (2017) 16 EurView 281, 284.
[32] Pech (n 19).
[33] See Bonelli (n 6) 286-287.
[34] Commission, 'Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374' [2016] OJ L 2/2/65, paras 55-56 (hereinafter "Recommendation 2 2016").
[35] Recommendation 2 2016 (ibid) para 46.
[36] Namely, she admitted the three quasi-judges into the Tribunal, following which she convened a General Assembly meeting at which only 6 other judges were present, five of whom voted for her,

PiS therefore secured the post of the First President of the CT, who is responsible for *inter alia*, attributing cases to judges of the CT. As other judges of the CT retired, the regime secured a majority on the CT.[37] Thus, the process that started with the passing of legislation inhibiting the effective functioning of the CT, coupled with unconstitutional judicial appointments, and an unconstitutional appointment of the first President of the CT, created a situation where PiS controlled the majority of the judges on the CT including the judges presiding over it. In turn, Przyłębska was able to manipulate the composition of the bench for 'politically sensitive' cases – the CT was able to invalidate previous legislation perceived 'as an obstacle to unconstitutional actions by the ruling elite' and validate or ignore legislation aimed at *inter alia* further undermining institutional checks and balances.[38] After the capture of the CT, the government repealed the legislation aimed at slowing down the CT so as to ensure they would possess an unencumbered judicial ally.

Thus, despite the Commission recommendation condemning the events in Poland, PiS managed to continue with its judicial reforms, and disable the CT's ability to exercise judicial review when it posed a threat to their rule. Once it acquired a majority of judges, it turned the CT into an 'active aide of the government and the parliamentary majority.'[39]

In response to the deteriorating situation in Poland and passing of the legislation on the functioning of the CT (which led to the appointment of Przyłębska as the First President of the CT), the Commission issued a second recommendation on the 21st of December 2016.[40] The recommendation reiterated the Commission's previous concerns and requests, but additionally targeted the legislation introducing the dubious appointments procedure for the new First President of the CT. The procedure was deemed as 'fundamentally flawed as regards the rule of law', as it further undermined the possibility of exercising effective judicial review.[41] The recommendation therefore *inter alia* repeated the Commission's previous requests, that Poland should publish and enforce decisions of the CT, restore the proper

three of whom were unconstitutionally appointed themselves. See Recommendation 2 2016 (n 34); Sadurski (n 8) 65.

[37] Sadurski (n 8) 79.

[38] ibid 69-70 79, 84. See also Commission 2020 (n 2) 3-4.

[39] Sadurski (n 9) 79-80, 84. See also Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 HJRL 1, 7.

[40] Recommendation 2 2016 (n 34).

[41] ibid para 59-60.

functioning of the CT by replacing the quasi-judges with validly appointed ones, and ensure that any laws on the CT's functioning are compliant with the CT's judgments over them.[42] Moreover, the recommendation required that a new First President of the CT is not appointed in the meantime, at least until the legislation could be reviewed by the CT and until the validly appointed judges are admitted to the CT.[43] The Commission maintained that a 'systemic threat to the rule of law' existed.[44]

Unsurprisingly the regime maintained that it was not committing any breaches of the rule of law and therefore refused to comply with the Commission's requests.[45]

2.3 Yet more dialogue: the third recommendation

With judicial review disposed of, the regime proceeded to its next phase of subordinating the remainder of the judiciary. This legislative package introduced by the government in 2017 sought *inter alia* to ensure that judges in ordinary courts and the SC would also become ideologically synchronised and cooperative towards the regime.[46] It has been described as the 'elimination of the existing system of checks and balances designed to secure the independence of the judiciary from the executive branch'.[47]

The legislative package included *inter alia* a Law on the Organization of Ordinary Courts, a Law on the SC, and a Law on the National Council of the Judiciary (NCJ).[48] They were all put forward in the first months of 2017, and while the former was adopted in July 2017, the latter two were vetoed by the President, perhaps due to the ongoing mass protests in Poland.[49] As will be highlighted in the following section, this veto turned out superficial – the two laws were adopted in December 2017 and only reflected 'cosmetic' changes, which did not limit

[42] ibid para 65.
[43] ibid para 66(f).
[44] ibid para 61.
[45] Minister of Foreign Affairs (Poland), 'A statement on Poland's response to European Commission's complementary Recommendation of 21 December 2016' (Warsaw, 20 February 2017); Sadurski (n 8) 221.
[46] See Bonelli (n 6) 287.
[47] Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19(7) German Law Journal 1839, 1840; Bonelli (n 6) 288; Sadurski (n 8) 97-98.
[48] Law of 12 July 2017 amending the law on the Ordinary Courts Organisation, JL 2017 Pos 1452; Law of 8 December 2017 on the Supreme Court, JL 2019 Pos 825; Law of 8 December 2017 amending the Law on the National Council of the Judiciary, JL 2018 Pos 3.
[49] Sadurski (n 8) 99; Bonelli (n 6) 288.

the executive's influence over the judiciary in any substantial way.[50] Before we consider the circumstances surrounding the fourth recommendation, we must first highlight some of the Commission's concerns presented in its third recommendation issued on the 26th of July 2017.[51]

Regarding the Law on the NCJ, the Commission illustrated concern over changes to its composition. The NCJ is responsible for appointing judges to all the courts in Poland.[52] Traditionally, fifteen of the twenty-five members of the NCJ were judges appointed by other judges.[53] However, in order to control future judicial appointments, the regime amended the procedure so that the lower house of Parliament would appoint the judge-members of the NCJ.[54] The law also allowed for dismissal of current judge-members of the NCJ 'despite their *constitutionally guaranteed* term of office'.[55] In turn, this would give 'the ruling party a decisive say in the composition of the [NCJ], and indirectly, in the nominations of judges.'[56]

As to the Law on the SC, the Commission illustrated its concern over the regime's increased control over the composition of the SC. In its initial form the law foresaw forced retirements of all SC judges,[57] and created a discretionary power which allowed for the extension of judicial terms of SC judges but only to those pre-selected by the Minister of Justice.[58] Given the amendments to the composition of the NCJ, this law would allow the regime to immediately subordinate the SC.[59] The law also foresaw the introduction of a DC into the structure of the SC which would be staffed completely by the politicised NCJ.[60] This chamber would pose a serious threat to judicial independence due to, in particular, the fact that disciplinary proceedings could be initiated by the Minister of Justice, and the case would be

[50] See Reasoned Proposal (n 1) 3.
[51] Commission, 'Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146' [2017] OJ L 228/19 (hereinafter "Recommendation 3 2017").
[52] Miroslaw Granat and Katarzyna Granat, *The Constitution of Poland* (Hart Publishing 2019) 124; Polish Constitution Articles 179, 186.
[53] Sadurski (n 8) 100.
[54] Recommendation 3 2017 (n 51). See also Commission 2020 (n 2) 4.
[55] Sadurski (n 8) 102 (emphasis added); Polish Constitution, Article 187(3); Recommendation 3 2017 (n 51) para 27.
[56] See Sadurski (n 8) 101. See also Recommendation 3 2017 (n 51) paras 24-30.
[57] Recommendation 3 2017 (n 51) para 35.
[58] ibid para 36.
[59] ibid para 37.
[60] ibid para 39.

decided by a chamber appointed by a politicised NCJ.[61] Accordingly, 'the mere threat of' such proceedings 'would directly affect the independence of judges of the [SC].'[62] In other words, the Chamber would be tasked with controlling the content of judicial rulings.[63]

Regarding the law on the Ordinary Courts Organisation, the Commission illustrated its concern over the regime's plans to directly increase their influence over the implementation of justice nationwide. The law lowered the age of retirement from 67 to 65 for male judges and 60 for female judges and gave the Minister of Justice a discretionary power to extend judicial mandates until the age of 70.[64] The law also extended the powers of the Minister of Justice to appoint and dismiss presidents of courts.[65] This ability to control and discipline court presidents is crucial when one considers the broad powers that they possess: they can decide on compositions of judicial panels and demote judges, and they too have cases to adjudicate.[66] Accordingly, judges not adjudicating in line with the regime's demands could be demoted or have their case load reallocated by politicised court presidents who, if they do not follow the recommendations of the Minister of Justice, could themselves be demoted, dismissed or receive a salary reduction. The law therefore allowed the ruling elites to replace judges in ordinary courts,[67] and more indirectly to start controlling the implementation of justice by all courts across the country.

The Commission therefore unsurprisingly highlighted in its third recommendation 'that the situation of a systemic threat to the rule of law in Poland… has seriously deteriorated.'[68] Besides reiterating its concerns over the insufficient improvements regarding the CT, the Commission also argued that if the legislative package was to be introduced this would

[61] ibid paras 40-41.
[62] ibid para 42.
[63] For further reforms to the law, and the damage posed to the rule of law, see Commission 2020 (n 2) 5-6. See also Case C-791/19 *Commission v Poland (disciplinary regime for judges)* EU:C:2021:596, para 157; Laurent Pech, 'Protecting Polish Judges from Political Control' (*Verfassungsblog,* 20 July 2021) <https://verfassungsblog.de/protecting-polish-judges-from-political-control/> accessed 24 August 2021.
[64] Recommendation 3 2017 (n 51) paras 31-34.
[65] ibid paras 19-23; Sadurski (n 8) 220.
[66] Sadurski (n 8) 116-118.
[67] See Koalicja Obywatelska, *Czarna Księga: 5 lat rządów PiS* [The Black Book: 5 years of PiS governance], (author tr) October 2020, 37-38 <https://platforma.org/upload/document/czarnaksiega/Czarna%20Ksi%C4%99ga_5%20lat%20rz%C4%85d%C3%B3w%20PiS.pdf> accessed 24 August 2021.
[68] Recommendation 3 2017 (n 51) para 45.

'structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole'.[69] The recommendation thus required *inter alia* that these laws 'do not enter into force'.[70] The Commission also emphasised its readiness to initiate Article 7 in the event of further deterioration,[71] but it is surprising that Article 7 was still not initiated especially given Poland's failure to adhere to the Commission's previous two recommendations (which the Commission itself also acknowledged).[72]

Poland's response of the 28th August 2017 went as one could have expected. It maintained a hostile approach indicating it would not 'make any concessions regarding its legislative package on the judiciary.'[73] The government deplored the Commission's 'language of ultimatums', its failure to grasp the 'substantive aspects of the reform', and its continued 'interference with the ongoing legislative process in Poland'.[74] Furthermore, they falsely claimed that the legislative package complied with EU judicial independence standards, and that in any case it was not the EU's concern since deciding on the functioning and structure of the national legal system was a Member State competence.[75]

2.4 The fourth recommendation and the end of the Rule of Law Framework

In the months following the third recommendation the situation deteriorated further. The Commission *inter alia* noted that the Minister of Justice 'started exercising the powers to dismiss court presidents',[76] and despite negative assessments over the new and updated versions of the two laws previously vetoed by the President,[77] they came into force on the 8th

[69] ibid para 45(2).
[70] ibid para 53(c).
[71] ibid para 57.
[72] ibid para 5.
[73] Sadurski (n 8) 221; Niklewicz (n 31) 284.
[74] Minister of Foreign Affairs (Poland), 'A statement following the European Commission's Recommendation of 26 July 2017 regarding the rule of law in Poland' (Warsaw, 28th August 2017). See Sadurski (n 8) 221; Paweł Wroński, 'Komisja Europejska przekazała Polsce zalecenia ws. praworządności. MSZ odpowiada [The European Commission relayed to Poland its recommendations regarding compliance with the rule of law. The Ministry of Foreign Affairs responds.]' (*Wyborcza.pl* (author tr), 28 August 2017) <https://wyborcza.pl/7,75398,22289791,msz-odpowiada-komisji-europejskiej.html> accessed 21 August 2021.
[75] Minister of Foreign Affairs, 28 August 2017 (ibid); Sadurski (n 8) 221.
[76] Commission, 'Commission Recommendation (EU) 2018/103 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520' [2018] OJ L 17/50, recital 17 (hereinafter "Recommendation 4 2017").
[77] ibid recital 25.

of December 2017.[78] Faced with constant deterioration and a lack of cooperation from Poland,[79] the Commission issued its fourth and final recommendation on the 20th of December 2017, alongside a separate 'reasoned proposal' initiating Article 7(1) TEU. The recommendation supplemented the findings and the initiation of Article 7(1),[80] but before we consider it, we must first consider how the RLF was concluded.

Given Poland's failure to adhere to the Commission's previous recommendations, the fourth recommendation echoed the previous ones.[81] It *inter alia* requested Poland to restore effective judicial review by restoring the CT's independence; to enforce the decisions of the CT from when it was still independent; to remedy the Commission's concerns regarding the laws introduced at the time of the third recommendation.[82] Importantly, it also highlighted the threat to the rule of law presented by the passing of the two initially vetoed laws. It is here where we see that the changes introduced were merely 'cosmetic' and did not attempt to limit the regime's control over the judiciary.[83]

The law on the NCJ would still forcibly retire its current judge-members,[84] but Parliament would have to approve the new NCJ appointments by a three-fifths majority and not a simple majority as the previous law dictated.[85] The amendment was insignificant as it still left the power to control the composition of this important body to the legislature thereby weakening its independence.[86]

The Law on the SC slightly differed to its previous iteration but again did not weaken the regime's plans to subordinate the judiciary. Instead of forcibly retiring all judges, the law would retire judges who reached the newly set retirement age of 65, or would do so within 3 months of the law's entry into force.[87] This still meant that 31 out of 83 SC judges would be forcibly retired and given the new composition of the NCJ this would allow the regime to

[78] ibid recitals 40-41.
[79] ibid paras 36-37.
[80] Sadurski (n 8) 220
[81] ibid.
[82] Recommendation 4 2017 (n 76) para 47.
[83] Reasoned Proposal (n 1) 3; Sadurski (n 8) 222.
[84] Recommendation 4 2017 (n 76) para 30.
[85] ibid para 32.
[86] ibid para 32.
[87] ibid para 5.

expeditiously amend the composition of the SC.[88] Furthermore, instead of giving the Minister of Justice the power to select the SC judges the terms of whom could be extended, the law instead created a discretionary power for the President of the Republic to extend these terms twice, by three years each time, upon the judge's request. This would not be subject to judicial review.[89] The amendment therefore did not weaken the executive's control over which judges would continue in their posts, the power was merely shifted from one member of the executive to another. The law also created *two* new completely autonomous Chambers within the [SC], which would be appointed solely by the new and politicised NCJ.[90] The Chamber of Extraordinary Control and Public Affairs would *inter alia* preside over 'extraordinary appeals', a procedure which would allow this newly politicised Chamber to overturn *any* judicial decision, thereby violating legal certainty and the non-retroactivity of law.[91] As to the DC, the other autonomous Chamber, the law removed the *explicit* competence of the Minister of Justice to initiate disciplinary proceedings.[92] Instead, it created the post of an 'extraordinary disciplinary officer appointed on a case-by-case basis by the President of the Republic', and by the Minister of Justice in certain specific circumstances.[93] Accordingly, the amendment did not limit the executive's influence over judges, it merely set up the post of a designated disciplinary proceeding instigator who would initiate the proceedings against any SC judge on behalf of the executive.[94]

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[88] ibid para 6. The forced retirements were ultimately reversed after increased pressure from the EU. See, e.g., European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 'The EU Framework for Enforcing the Respect of the Rule of Law and the Union's Fundamental Principles and Values' (25 January 2019) PE 608.856, 23-25. See also Maciej Tabarowski and Paweł Marcisz, 'The first judgment of the ECJ regarding a breach of the rule of law in Poland?' (*Verfassungsblog,* 29 May 2019) <https://verfassungsblog.de/the-first-judgment-of-the-ecj-regarding-a-breach-of-the-rule-of-law-in-poland/> accessed 24 August 2021; Laurent Pech and Patryk Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P. (Part I)' (*Verfassungsblog,* 13 January 2020) <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/> accessed 24 August 2021.

[89] Recommendation 4 2017 (n 76) paras 13-15.

[90] ibid para 25.

[91] ibid paras 18-21. See also Sadurski (n 8) 114; Council of Europe, European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts' adopted by the Venice Commission at its 113th plenary session, Strasbourg, 11 December 2017, Opinion No 904/2017, CDL-AD(2017)031, 12-14.

[92] But note that he retained some powers (Recommendation 4 2017 (n 76) para 23).

[93] ibid.

[94] ibid, also see para 24. For some further amendments, see also Section 3.1 in this chapter.

On top of reiterating its previous concerns and recommendations the Commission therefore also required Poland to amend these two new laws in order to ensure compliance with principles of separation of powers, judicial independence, and the rule of law. It *inter alia* required that the retirement age should not be lowered for SC judges, that the President's discretionary power to extend judicial terms be removed, that the extraordinary appeal procedure be removed;[95] it also prohibited the termination of the current judge-members in the NCJ and that the appointments be made by judges, not Parliament.[96]

The tone of Poland's response slightly differed this time, with a more 'conciliatory note' being struck, perhaps owing to the initiation of Article 7(1) TEU alongside the fourth recommendation.[97] The government, for instance, tried to argue that the reforms were necessary and that they owed it to their voters, but also that it made concessions to its previous legislation so as to avoid further contention with the Commission. As illustrated above, and as recognised by the Commission itself, these changes were merely 'cosmetic' and constituted a façade of compliance, as the amendments did not limit the regime's influence over the judiciary in any substantial way. Accordingly, the threat to the rule of law persisted and there was no reversal of the government's plans.

In sum the RLF allowed the Commission to gather evidence on Poland and to illustrate the damaging nature of the reforms introduced by the PiS government,[98] which ultimately led to the activation of Article 7 TEU. However, despite the open hostility and defiance of the Polish government, the Commission decided to continue dialogue and repeatedly issue recommendations to no effect. This dialogue, and four recommendations, lasted from January 2016 to December 2017. Therefore, for almost two years the Polish government was able to continue with its plans of subordinating the judiciary, with the RLF merely criticising the developments, unable to enforce change in any substantial way.[99] In that time, Poland

[95] ibid para 46(a).
[96] ibid para 46(b).
[97] See Sadurski (n 8) 221-222. Minister of Foreign Affairs (Poland), 'A statement on the European Commission's decision to launch the disciplinary process against Poland laid out in Article 7 of the TEU' (Warsaw, 20 December 2017).
[98] Commission, 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' (Communication) COM/2019/163 final, 3.
[99] Pech and Scheppele (n 5) 27ff.

managed to take over the CT thereby disposing of effective judicial review and introduce major reforms affecting judicial independence and separation of powers.

However, as the following section will illustrate, the escalation of the EU's response via the activation of Article 7(1) TEU has also proven ineffective. Poland's rule of law violations have not been stopped.[100]

3. Article 7 TEU: December 2017 onwards

At the time of the fourth recommendation, on the 20th of December 2017, the Commission also issued its 'reasoned proposal' for the activation of Article 7(1) TEU,[101] which was later formally presented to the Council in February 2018.[102] In it the Commission reiterated its findings from the RLF, thereby highlighting Poland's constant deterioration which negatively affected 'the entire structure of the justice system in Poland'.[103] Furthermore, the Commission acknowledged Poland's failure to cooperate and adhere to its recommendations.[104] Consequently, it was forced, after two years of dialogue, the effect of which was questionable, to escalate the EU's response and activate Article 7.[105] The initiative therefore signalled that the EU was escalating its approach and acknowledging the severity of the problem in Poland.[106] This escalation, meant the involvement of other EU institutions in the process. Importantly, it shifted the responsibility to act to the Council and the Member States therein – the effectiveness of the procedure would now rest in their hands.[107] Sadly, as

[100] See, e.g., Commission 2020 (n 2) and Commission 2021 (n 2).
[101] Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (*EC Press Corner,* 20 December 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367> accessed 24 August 2021; Reasoned Proposal (n 1).
[102] Council, 'Outcome of the Council Meeting, 3599th Council meeting, General Affairs', Brussels, 27 February 2018, Doc 6576/18; Bonelli (n 6) 296.
[103] Reasoned Proposal (n 1) para 173.
[104] ibid para 175.
[105] ibid para 184.
[106] See Laurent Pech and Kim Lane Scheppele, 'Was the Commission Right to Activate pre-Article 7 and Article 7(1) Procedures Against Poland?' (*Verfassungsblog,* 7 March 2018) <https://verfassungsblog.de/was-the-commission-right-to-activate-pre-article-7-and-art-71-procedures-against-poland/> accessed 24 August 2021.
[107] Council, 'Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal - Report of the hearing held by the Council on 26 June 2018', Brussels, 8 August 2018, Doc 10906/18, 2 (hereinafter "Hearing 1"). See also Sadurski (n 9) 226; Tomasz Tadeusz Koncewicz, 'Dusting off the Old Precedent – Why the

this section will illustrate, while symbolically the initiation of Article 7 may have constituted an acknowledgment of the crisis in Poland, in practice shifting the responsibility to the Council has allowed the crisis to be trivialised, thereby highlighting the mechanism's unsuitability in resolving backsliding.

In order to illustrate Article 7's hitherto failure to resolve rule of law backsliding, this section will first consider the immediate impact of the Commission's initiation of Article 7(1) proceedings against Poland. Namely, it led to the formation of three hearings in the Council, between December 2017 and December 2018. It will be illustrated that despite the Commission accumulating increasingly damning evidence, highlighting Poland's violation of the rule of law, the Council failed to make use of the toolkit available to it under Article 7's preventative arm – it failed to issue any recommendations or issue a warning to Poland of its situation representing a 'clear risk of a serious breach' to the EU's values. Subsequently, the section will illustrate the deficient format of the hearings which certainly did not help in preventing further deterioration in Poland.

Secondly, it will be highlighted how the Council seemingly delegated the task of protecting the EU's values to the Commission and the CJEU, thereby failing to illustrate adequate concern with the threat to the EU posed by rule of law backsliding. The section will first illustrate Poland's continuous deterioration and the threat the events from 2019 onwards have posed to the operation and functioning of the EU's legal system, and accordingly, the EU's rule of law. Subsequently, the Council's failure to utilise Article 7 during this time will be highlighted (the single hearing held in June 2021 notwithstanding).

Therefore, simply put, the national governments in the Council, tasked with (and responsible for) the employment and effectiveness of Article 7(1) TEU have failed to illustrate adequate concern with the threat to the EU posed by rule of law backsliding.

Commission Must Stick to the Art. 7 Procedure Against Poland' (*Verfassungsblog,* 12 June 2018) <https://verfassungsblog.de/dusting-off-the-old-precedent-why-the-commission-must-stick-to-the-art-7-procedure-against-poland/> accessed 24 August 2021.

3.1 Article 7(1) TEU in action: three hearings in 2018

Following the presentation of the reasoned proposal to the Council in February 2018, the European Parliament adopted a resolution calling for 'swift action' by the Council.[108] This call for action, however, remained unanswered. Indeed, while the situation in Poland was sufficiently concerning so as to lead to the organisation of three separate hearings – on the 26th June, 18th September, and 11th December 2018[109] – these did not lead to any change on the ground.

Prior to the hearings the Commission and the Polish delegation provided official stances through written statements, and during the hearings other Member States were able to ask questions. However, these hearings did not lead to the issuing of any recommendations by the Council, nor the issuing of the official warning that there was a 'clear risk of a serious breach' of Article 2 TEU values in Poland. One may find this puzzling as the situation in Poland had been continuously deteriorating throughout this time. To illustrate this deterioration, recall that the Law on the SC introduced a disciplinary regime for judges whereby the President of the Republic, and indirectly the Minister of Justice, could appoint individuals to investigate judges and initiate a disciplinary proceeding, and these would be adjudicated upon by the DC, a new autonomous chamber of the SC staffed solely by the politicised NCJ.[110] Therefore, the body deciding in disciplinary cases, as well as the prosecutors initiating these cases, are strongly connected to the PiS government, and such a disciplinary regime 'creates concerns as regards the principle of separation of powers and may affect judicial independence'.[111] The Commission presented these concerns to the Council during the first hearing.[112]

[108] Parliament, 'Resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP))', P8_TA(2018)0055, para 2; Bonelli (n 6) 296.
[109] Hearing 1 (n 107); Council, 'Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal - Report of the hearing held by the Council on 18 September 2018', Brussels, 5 November 2018, Doc 12970/18 (hereinafter "Hearing 2"); Council, 'Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal - Report on the hearing held by the Council on 11 December 2018', Brussels, 20 December 2018, Doc 15469/18 (hereinafter "Hearing 3"). The most recent hearing held in June 2021 will be discussed in section 3.2.1. Council, 'Rule of Law in Poland - Article 7(1) TEU Reasoned Proposal - Report on the hearing held by the Council on 22 June 2021', Brussels, 9 July 2021, Doc 10246/21 (hereinafter "Hearing 4").
[110] Reasoned Proposal (n 1) paras 133-135.
[111] ibid para 133.
[112] Hearing 1 (n 107) 9.

By the second hearing the disciplinary regime had evolved further. An amendment to the law introduced in July 2018 allowed for 'the disciplinary officer (appointed by the Minister of Justice) to appoint deputies of his choice', thereby increasing the Minister's influence over individuals dealing with disciplinary proceedings.[113]

By the third hearing the Commission highlighted an increase in disciplinary proceedings initiated by the regime against judges criticising the judicial reforms and against judges issuing preliminary references to the CJEU.[114] Furthermore:

> disciplinary officers appointed by the Minister of Justice exercised their power to take over investigations carried out by disciplinary officers appointed at the request of the judiciary, including in cases where the judges concerned were found by the latter not to have committed a disciplinary offence.[115]

Thus, even by the third hearing, the Commission highlighted that its 'concerns… fully remain',[116] and understandably so. The regime has tried to shield itself from scrutiny by threatening judges willing to criticise their reforms with arbitrary disciplinary proceedings, thereby increasing the influence of the legislative and executive branches over the judiciary.[117]

The Commission therefore 'produced increasingly damning evidence' proving that the developments in Poland were harmful to the rule of law and therefore certainly posed a clear risk of a serious breach of the EU's values.[118] Commentators point out that Poland was into the 'serious and persistent' breach territory of the sanctioning arm of Article 7 since the violations were increasingly obvious and systemic.[119] However, this appears to have been insufficient in convincing the Council that the events in Poland were sufficiently dire – namely,

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[113] Council, 'Rule of Law in Poland / Article 7 (1) TEU reasoned proposal (European Commission contribution for the hearing of Poland on 18 September 2018)', Brussels, 11 September 2018, Doc 12034/18, pages 14-15 (hereinafter "September Contribution").
[114] Council, 'Rule of Law in Poland / Article 7 (1) TEU reasoned proposal (European Commission contribution for the hearing of Poland on 11 December 2018)', Brussels, 5 December 2018, Doc 15197/18, page 13 (hereinafter "December Contribution").
[115] ibid.
[116] ibid.
[117] ibid.
[118] Sadurski (n 8) 226.
[119] See Pech and Scheppele 2018 (n 52) and Kochenov (n 4) 141.

that the threat to the EU's values was sufficiently clear – to require the issuing of any recommendations or its official warning.

With the Council failing to exert any substantial pressure on Poland, Article 7(1) TEU hearings have achieved very little. They have allowed the Commission to produce reports on the violations in Poland, and they gave the opportunity for Member States truly concerned with such violations to scrutinise the events in Poland. But lacking any official condemnation or even the issuing of recommendations in the Council, Poland has not been deterred. Indeed, the provision was even referred to as 'dead' by the (then) Minister of Foreign Affairs, Jacek Czaputowicz.[120] While the proceedings have not ceased, and the Council could schedule a hearing at any time, there is some truth to this declaration as after the December 2018 hearing, no other hearing was held until June 2021.[121] As will be illustrated later, even at this hearing, the Council has failed to exert additional pressure on Poland. In order to illustrate why these hearings have thus far achieved very little, we may consider their deficient format.

3.1.1 Format of the hearings

A series of Freedom of Information requests by Laurent Pech have allowed him to bring to light some of the issues with the format of the hearings held under Article 7(1) TEU.[122] The fact that little progress has been made under this procedure may, as will become apparent, be attributed to the heavily 'deficient format' of these hearings,[123] which do not adequately reflect the scrutiny expected from a procedure aimed at protecting the EU's values.

As a starting point we may take the fact that the Council's decision to construe the hearings in a 'peer-review' format, which aims to 'enable ministers to have a more in-depth exchange… on the key concerns identified' by the Commission.[124] Pech criticises this 'attempt to "dedramatise" Article 7(1) proceedings' as 'difficult to reconcile with the purpose and content of this Treaty provision.'[125] Indeed, bearing in mind that the procedure was introduced to enforce and safeguard the values of the EU, and the fact that the hearings are the main means

[120] Polsat News (n 3).
[121] See Section 3.2.1; Hearing 4 (n 109).
[122] Laurent Pech, 'From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date' (*Verfassungsblog,* 13 November 2019) <https://verfassungsblog.de/from-nuclear-option-to-damp-squib/> accessed 24 August 2021.
[123] Pech 2019 (n 122).
[124] ibid. See also Hearing 1 (107) 3.
[125] Pech 2019 (n 122).

of illustrating to the Council that a particular Member State is posing 'a clear risk of a serious breach' to the EU's values, it is questionable that the format of the hearings is not aimed at scrutiny of the potentially harmful developments in a Member State, but at yet more dialogue and some form of constructive feedback.

This issue becomes evident when considering that the format of the hearings allows the State questioned to make 'false [and] misleading' statements.[126] This is so, because the national delegations questioning the Member States concerned are given a 'maximum of two minutes for a maximum of two questions… while the representatives of the government subject to Article 7 can spend up to 10 minutes answering *each* question'.[127] This, combined with the fact that the Council does not conduct any form of fact checking 'either before, during or after the hearings', means that any incorrect statements made by the government being questioned can hardly be picked up as and when they are made, unless a national delegation possesses sufficient 'expertise… to *quickly* spot false or misleading statements'.[128] Thus, the procedure has been designed in a way which favours the Member State being questioned – even if the other national delegations possess the knowledge allowing them to scrutinise the events in Poland, the modalities of the hearing prevent these delegations from exerting adequate pressure and conducting sufficient scrutiny given that they are confined to a maximum of two interventions each. It leads to an illogical or absurd situation where, for a State questioned under Article 7(1) to be meaningfully scrutinised, a concerted effort from all of the other delegations is required so that where the questioning capacity of one delegation is depleted, another can come in and respond to the misleading claims made in response to the questions asked by the previous delegation. In other words, a mechanism designed with the aim of scrutiny has been qualified in such a way as to make such scrutiny near impossible to carry out. The process therefore hardly reflects a framework suitable for assessing violations to the EU's values.

[126] ibid. See also Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU' in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremler (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (TMC Asser Press 2020) 259-260.
[127] ibid. See also Council, 'Standard modalities for hearings referred to in Article 7(1) TEU', Brussels, 9 July 2019, Doc 10641/2/19, paras 8, 14, 20.
[128] Pech 2019 (n 122).

This lack of follow-up and sufficient scrutiny on the misleading claims of the Polish government can easily be spotted in any of the hearings. Indeed, as an example of this, in the third hearing held in December 2018, the Belgian delegation 'asked why the [CT] had been requested to verify the compatibility of the Treaty provision on the preliminary question mechanism with the Polish Constitution.' The Polish delegation responded that 'this is a question of interpretation of the Treaty and that the Polish courts have been asked questions on issues remaining national competence.'[129] This *prima facie* appears a genuine argument – preliminary reference questions issued by national courts should focus on the interpretation or validity of a provision of *EU law*. However, this point ignores the fact that preliminary reference questions have mostly focused on whether the reforms of the government had undermined judicial independence. As highlighted by the CJEU, such questions do fall within the scope of EU law and can be asked as questions of interpretation by domestic courts *even if the competence to act in this field is reserved for the Member State*, due to the fact that domestic courts are tasked with enforcing EU law and thus their independence is also crucial for the proper implementation of EU law.[130] Therefore, Poland's basis for attempting to limit domestic courts from referring questions to the CJEU was legally incorrect, but there appears to be no evidence in the hearing report of this being questioned. The Council has therefore opted for a model which allows it to accept statements made by Poland at face value, without verifying their accuracy or sincerity.

A separate albeit equally concerning development may also be spotted in the participation of Member States in the hearings. As Pech and Grogan illustrate, in the three hearings concerning Poland, and the one hearing concerning Hungary, 12 Member States did not ask a single question.[131] That is, 12 out of 27 Member States have not shown interest in the questionable events transpiring in Poland and Hungary. It would appear that in refusing to hold their peers to account, these uninterested States seem to be ignoring the fact that the

[129] Hearing 3 (n 109) 4.
[130] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, paras 32-37. The judgment was passed in February 2018, approximately 9 months before the third hearing. Poland's refusal to acknowledge the content of this ruling arguably illustrates its disregard towards the Court's jurisprudence and jurisdiction. For a more recent restatement of this principle, in the Polish context, see Case C-791/19 *Commission v Poland (disciplinary regime for judges)* EU:C:2021:596, paras 56, 95, 136.
[131] Pech 2019 (n 122).

protection and enforcement of the EU's values is a responsibility of *all* the EU's institutions *and* Member States.[132]

Therefore, given the deficient format of the hearings it is hardly surprising that no recommendations have been issued, or determination of a 'clear risk' made. These require the attainment of a four-fifths majority, meaning that 22 Member States on the Council must support the motion. If, however, 12 Member States are unwilling to even ask a question on the developments in Poland – which clearly violate the rule of law and therefore Article 2 TEU – it is at least doubtful that they would be willing to declare a 'clear risk of a serious breach' of the rule of law if the Council Presidency did schedule a vote on the matter.

3.2 Events post December 2018: a challenge to the EU's functioning

After December 2018 PiS' subordination of the judiciary began to produce very real problems for the EU. In order to illustrate this problem, we may start with the fact that in 2018 and 2019 the regime began to utilise more frequently its means of suspending and dismissing uncooperative judges.[133] As a result, independent remnants of the SC issued a preliminary reference to the CJEU, asking whether judges not appointed through an impartial process could still be considered judges (and thus render binding decisions) under EU law. The Court responded in November 2019 in its *AK* ruling,[134] highlighting that for its effective implementation EU law requires national courts to be independent and impartial.[135] It therefore requested national courts – in line with obligations rooted in the principle of supremacy – to disapply the legislation which allowed for such an improper judicial body to operate.[136] In response, three chambers of the SC (still relatively independent and impartial) issued a resolution in January 2020, and in line with the criteria for assessing impartiality provided by the CJEU in *AK*, found that any judicial body staffed with judges appointed by the

[132] Commission, 'Strengthening the rule of law within the Union: A blueprint for action' (Communication) COM/2019/343 final, 3, 16.
[133] See Venice Commission (n 91) 4; Pech and Wachowiec (n 88).
[134] Joined Cases C-585/18, C-624/18 and C-625/18 *AK v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy* EU:C:2019:982 (hereinafter "*AK*"). See also Pech and Wachowiec (n 88).
[135] See *AK* (ibid) paras 171, 123 and 134.
[136] *AK* (n 134) paras 156-161 and 171; Łukasz Bucki, Marcjanna Dębska and Michał Gajdus, '"You Cannot Change the Rules in the Middle of the Game" – An Unconventional Chapter in the Rule of Law Saga (Case C-824/18 A.B. and others v the KRS)' (*European Law Blog*, 22 April 2021) <https://europeanlawblog.eu/2021/04/22/you-cannot-change-the-rules-in-the-middle-of-the-game-an-unconventional-chapter-in-the-rule-of-law-saga-case-c-824-18-a-b-and-others-v-the-krs/> accessed 24 August 2021.

NCJ could lack independence and as such its decisions could be challenged for lack of impartiality in the appointments process.[137] The resolution therefore amounted to a finding that the DC is not a court and therefore cannot issue binding decisions.[138]

In order to protect its judicial appointments from being undermined, the PiS government used its politicised CT to undermine the SC resolution and declare it invalid.[139] It also passed what has come to be known as the muzzle law in December 2019.[140] The law is deeply problematic and strengthens the regime's control over the judiciary, but for our purposes we only need to consider one of its provisions.[141] The law made it a disciplinary offence for judges to question the legitimacy of judicial appointments, and retroactively discontinued any cases attempting to do so.[142] The law stipulated that the only body able to assess validity of judicial appointments would be the Extraordinary Chamber of Public Affairs – recall that this body was also staffed completely by the politicised NCJ, precisely the appointments of which were being assessed.[143] The law therefore attached disciplinary consequences on any judge or judicial body attempting to enforce the *AK* judgment and assess the legality of judicial appointments,[144] or to issue further preliminary reference questions to the CJEU on the matter.[145] The law has been in force from March 2020, and 'has been hampering the actual

[137] Supreme Court, Resolution of 23 January 2020, BSA I-4110-1/20. See also Witold Zontek, 'You Can't Forbid Judges to Think: Why the Polish Constitutional Tribunal's injunction against the Supreme Court resolution is legally pointless' (*Verfassungsblog*, 5 February 2020) <https://verfassungsblog.de/you-cant-forbid-judges-to-think/> accessed 23 March 2020.

[138] Adam Bodnar and Paweł Filipek, 'Time Is of the Essence' (*Verfassungsblog,* 30 November 2020) <https://verfassungsblog.de/time-is-of-the-essence/> accessed 24 August 2021.

[139] Constitutional Tribunal, Judgment of 20 April 2020, U 2/20; Constitutional Tribunal, Judgment of 21 April 2020, Kpt 1/20. See also Commission 2020 (n 2); Zontek (n 137); Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part I)' (*Verfassungsblog,* 13 January 2021) <https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-i/> accessed 24 August 2021.

[140] Law of 20 December 2019 amending the law on ordinary courts, the law on the Supreme Court and certain other laws, JL 2020 Pos 190. (Hereinafter 'muzzle law').

[141] For an overview see Commission 2020 (n 2).

[142] ibid 7-8.

[143] Bodnar and Filipek (n 138).

[144] Renáta Uitz, 'EU Rule of Law Dialogues: Risks – in Context' (*Verfassungsblog,* 23 January 2020) <https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/> accessed 26 August 2021.

[145] Bucki, Dębska and Gajdus (n 136).

application of the *AK* ruling which set out the method and criteria for assessing judicial independence.'[146]

With Poland actively undermining the ability of domestic courts to assess the independence and operation of the improperly appointed DC, the CJEU issued in April 2020 an interim relief order which held that legislative provisions allowing the DC to initiate disciplinary proceedings against judges had to be suspended.[147] Thus, in an 'unprecedented' manner the Court 'demanded the immediate suspension… of the processing of all disciplinary cases regarding judges'.[148] This infringement proceeding was initiated by the Commission April 2019,[149] before the passing of the Muzzle Law, and therefore concerned the operation of the disciplinary regime prior to its amendments. Thus, the initial infringement proceedings initiated in April 2019 (and thus the interim relief order of April 2020) did not *explicitly* capture the alternative ways in which the regime could punish recalcitrant judges and as such, following the April 2020 interim relief order, 'instead of continuing to persecute independent judges on the back of formal disciplinary proceedings, Polish authorities started suspending judges… by initiating unfounded criminal charges against them and getting them suspended by the DC via the lifting of their judicial immunity.'[150] Despite criticism – as the revocation of immunities was not substantially different to the previously held disciplinary proceedings – the Commission did not request penalty payments for non-compliance with the injunction, seeing that the Court's order referred to disciplinary proceedings and not revocation of judicial immunities.[151] Poland was therefore allowed to completely disregard the order of the

[146] Bodnar and Filipek (n 138). See also Pech and Wachowiec (n 88); Pech, Wachowiec and Mazur 2021b (n 139).
[147] C-791/19R *Commission v Poland (disciplinary regime for judges)* EU:C:2020:277.
[148] Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland (Interim proceedings)*' (2021) 58(1) CML Rev 137.
[149] Commission, 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control' (*EC Press Corner,* 10 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033> accessed 24 August 2021.
[150] Pech 2021 (n 63).
[151] Although CJEU Judge Safjan later confirmed that they were essentially the same thing, and thus failure to adhere to the interim relief order represented a violation of the CJEU order. See Anna Wójcik, 'Sędzia TSUE: Izba Dyscyplinarna nie ma prawa orzekać takich sankcji jak wobec Tulei i Morawiec [CJEU Judge: the Disciplinary Chamber may not lawfully impose the sanctions it imposed on Tuleya and Morawiec]' (*OKO.press* (author tr), 25 November 2020) <https://oko.press/izba-dyscyplinarna-nie-ma-prawa-orzekac/> accessed 21 August 2021. See also Pech 2021 (n 63) and Bodnar and Filipek (n 146).

CJEU, by allowing the DC to continue operating in a different manner, still allowing the regime to punish recalcitrant judges and members of the legal profession.[152]

Following further pressure from the CJEU,[153] and at the request of the DC (the very same Chamber whose operation was to be suspended),[154] the CT held on the 14th of July 2021 that interim relief orders, relating to the structure and functioning of the judiciary, were contrary to the Polish Constitution and were therefore to be deprived of supremacy.[155] This was a crucial moment in Poland's rule of law backsliding and its attitude towards the EU. In what can only be seen as a culmination of PiS' efforts to control the justice system in Poland, the government, after outlawing preliminary references and explicitly rendering the *AK* ruling inapplicable, after using its politicised CT to render null and void attempts at enforcing the *AK* ruling (as explicitly required by EU law), after explicitly ignoring an interim relief order's object and purpose (indeed the DC continued to operate by other, equally harmful, means), the regime has now blatantly undermined a key concept of EU law – the CT confined the scope of EU law in the Polish legal order, in violation of supremacy (which requires EU judicial decisions and legislative provisions to precede national judicial decisions and legislative provisions) and autonomy (as only the CJEU may determine the scope of EU law) of EU law. Pech has therefore rightly described the process as one of 'EU-legal-disintegration'.[156] The EU can hardly possess a legal order if the decisions of its Court are not respected or if the rules upon which it is based are not adhered to. Functional legal systems require *inter alia* authority, consistency, and the ability to fix dysfunctions – an EU incapable of doing this can hardly possess its own legal system.[157]

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[152] Pech, Wachowiec and Mazur 2021b (n 139).

[153] See e.g. Case C-824/18 *AB and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153; Bucki, Dębska and Gajdus (n 136).

[154] Jakub Jaraczewski, 'Polexit or judicial dialogue?' (*Verfassungsblog,* 19 July 2021) <https://verfassungsblog.de/polexit-or-judicial-dialogue/> accessed 24 August 2021.

[155] Constitutional Tribunal, Judgment of 14 July 2021, P 7/20.

[156] Pech 2021 (n 63).

[157] See Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1057-1058. Also note that another, possibly more damaging case is constantly being delayed by the CT. The CT has been asked to assesses whether Article 2 TEU, Article 19(1) TEU and Article 4(3) TEU are compliant with the Polish Constitution. These are the exact provisions used by the CJEU to review the rule of law violations in Poland. The government therefore seeks to undermine supremacy and applicability of EU law (and the protection of EU values) more generally. See, Constitutional Tribunal, case pending, K 3/21; Jaraczewski (n 154).

We may briefly note that this ruling coincided with two other decisions of the CJEU concerning Poland's disciplinary regime – an interim relief order issued on the 14th July 2021 in the context of infringement proceedings brought against the Muzzle Law,[158] and a decision in the infringement proceedings concerning the disciplinary regime prior to the introduction of the Muzzle Law issued on the 15th July 2021[159] – both of which found Poland's disciplinary regime as existing in violation of EU law due to *inter alia* the fact that it undermines judicial independence, viz., the disciplinary regime is likely to influence through 'pressure and [its] deterrent effect' judicial decision-making and therefore affect how judges implement law, including EU law.[160] The government's initial response was hostile and indicated a refusal to comply,[161] but the tone changed with the Commission making it clear it would resort to financial penalties under Article 260 TFEU if Poland failed to explain how it would adhere to the decisions by the 16th August 2021. The Commission was clear that 'EU law has primacy over national law' and it appears ready to enforce this.[162] Consequently, Poland's *de facto* leader Jarosław Kaczyński stated he would ensure that the DC will be eliminated "in its current form" so as to remove the reason for contention with the EU.[163] It is unlikely that this is a sincere statement, and the government may only be creating yet another façade of compliance as the President had done through his vetoes to the two 2017 laws, thereby buying themselves more time to further entrench themselves in power. Regardless, the point being made here is that the situation in Poland is creating problems for the functioning and integrity of the EU's legal order, and that it is being acknowledged and addressed by the Commission and the Court. Given the threat posed to the EU by rule of law backsliding, one

[158] Case C-204/21R *Commission v Poland (amending law)* EU:C:2021:593.
[159] *Commission v Poland (disciplinary regime for judges)* (n 130).
[160] ibid para 157.
[161] Agnieszka Barteczko (William Maclean (ed)), 'Polish justice minister says Warsaw cannot comply with EU's court ruling' (*Reuters*, 21 July 2021) <https://www.reuters.com/world/europe/polish-justice-minister-says-warsaw-cannot-comply-with-eus-court-ruling-2021-07-21> accessed 21 August 2021.
[162] Deutsche Welle, 'EU threatens fines against Poland over judiciary ruling' (*DW,* 20 July 2021) <https://www.dw.com/en/eu-threatens-fines-against-poland-over-judiciary-ruling/a-58570278> accessed 21 August 2021.
[163] Sara Bounaoui, 'Kaczyński o Izbie Dyscyplinarnej SN: Zlikwidujemy ją i w ten sposób zniknie przedmiot sporu [Kaczyński on the Disciplinary Chamber of the S.C.: we will eliminate it and the point of contention will be gone]' (*RMF24.pl* (author tr), 7 August 2021) <www.rmf24.pl/raporty/raport-batalia-o-sady/fakty/news-kaczynski-o-izbie-dyscyplinarnej-sn-zlikwidujemy-ja-i-w-ten-,nId,5406354#crp_state=1> accessed 21 August 2021.

would therefore be forgiven for expecting all of the EU's institutions to try to resolve this problem – especially those tasked with the operation and enforcement of the EU's strongest enforcement tool. However, as the following section will illustrate, the Council has failed to adequately respond to the crisis.

3.2.1 The Council's response (or lack thereof)

Article 7(1) hearings, while deficient in format, still provided an opportunity for Member States truly committed to the rule of law to scrutinise the events in Poland.[164] Their inexistence is therefore problematic and arguably indicative of the Council's refusal to acknowledge the threat posed by the events in the EU's backsliding States.[165] Indeed, between December 2018 and June 2021 the Council failed to schedule a single hearing concerning Poland despite the clear and constant deterioration therein. It held a few confidential state of play meetings where it 'took note' of the events in Poland and has issued a series of '(non-binding) conclusions' illustrating its "concerns" about the situation in Poland,[166] but these cannot be comparable to the hearings under Article 7(1) TEU which arguably should aim to facilitate a process of prevention and resolution of threats posed to the EU's values. Thus, simply put, the Council has failed to devote sufficient time or attention to the rule of law backsliding in Poland, especially given the aforementioned threat to the functioning of EU law. With no hearings held, it appeared that the Council had completely deferred the duty to protect the EU's values to the Court and Commission.[167]

However, after years of inactivity, the Council then organised a hearing on the 22nd of June 2021.[168] It had the opportunity to discuss the continued operation of the DC; Poland's refusal to adhere to the interim relief order of April 2020; the Muzzle Law and its implications for judges issuing preliminary references to the CJEU. As illustrated previously, these

[164] Pech and Wachowiec (n 21).
[165] Parliament, 'Resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP))', P9_TA(2021)0287, paras 2, 5; Sébastien Platon, 'Bringing a Knife to the Gunfight' (*Verfassungsblog,* 11 June 2021) <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/> accessed 24 August 2021; Uitz (n 144).
[166] Council, 'Draft Minutes of Council of the European Union (General Affairs) Meeting on the 22 September 2020', Brussels, 1 October 2020, Doc 11008/20, 3; Pech, Wachowiec and Mazur 2021a (n 39).
[167] Pech, Wachowiec and Mazur 2021a (n 39) 20.
[168] Hearing 4 (n 109).

developments undermine the integrity of the EU's legal order and strike at the EU's foundations rooted in mutual trust and judicial interdependence. However, after two years of Council inactivity, we were faced with yet another anti-climactic episode. This hearing turned out lacklustre for *inter alia* two reasons.

First, PiS' continued violation of EU values went without sufficient scrutiny. The regime highlighted its readiness to implement judgments of the CJEU and argued that it was compliant with the interim relief order of April 2020 as the DC's disciplinary activities were suspended, with the Chamber continuing 'to adjudicate only in cases concerning the immunity of judges in criminal proceedings.'[169] As mentioned previously, this constituted disciplinary proceedings by other means, and therefore amounted to superficially complying with the April 2020 interim relief order. Nonetheless, despite PiS' misleading claims and its continued violation of the EU's values, the regime was not held to account before the Council. The report on the hearing does not illustrate any meaningful scrutiny of such claims by the other national delegations and after the hearing there was no indication of a recommendation, or a warning being issued by the Council.

Secondly – and this could be a reason for the lacklustre scrutiny during, and outcome of, the hearing and of the entire Article 7(1) TEU procedure in general – the concern of national delegations in the rule of law crisis in Poland appears to have drastically deteriorated. While there were approximately 12 Member States failing to ask questions at the previous three hearings in 2018, at this hearing only 11 national delegations *did* illustrate their concern by questioning Poland.[170] That is, 16 out of 27 Member States failed to discuss the constantly deteriorating situation in Poland. With approximately three-fifths of Member States in the Council uninterested in the events in Poland, it is unlikely that a four-fifths majority required under Article 7(1) can be attained.

Accordingly, the Council has failed to make use of a tool which was designed with that specific body in mind – it has continuously abrogated its responsibility to protect the EU's values.

[169] Hearing 4 (n 109) 3-4.

[170] The document states that 10 delegations asked questions, but the German delegation asked a question on behalf of itself and the French delegation, therefore the thesis counts this as 11 Member States illustrating their willingness to question Poland (Hearing 4 (n 109) 2).

4. Conclusion

The process of rule of law backsliding in Poland has allowed the PiS government to subordinate a large part of the Polish judiciary to its will. The CT is being used for political purposes, with the regime most recently using it to limit the supremacy of EU law in the sphere of the structure and functioning of domestic justice systems in order to limit the EU's interference and shield themselves further from scrutiny. Presumably, the regime is trying to do the same with ordinary courts and the SC, so as to ensure that all law enforcement is in line with the government's agenda. Through a campaign of judicial appointments, dismissals, and disciplinary proceedings the regime is trying to shape the way judges apply the law. Fortunately, while it may be too late for the EU to reverse the appointments already made, the Commission and the CJEU have drawn a line – a line which the Polish government does not wish to cross given its potentially extensive financial burden. The Court and Commission understand the threat posed to the EU by a judiciary devoid of independence and impartiality. Such a judiciary is less likely to enforce EU law as interpreted by the CJEU, and more likely to construe it based on the needs and desires of the ruling party. If this continues, as it has been, one may only fear what the state of the EU's legal order will be in the next five or ten years.

Arguably the situation in Poland has deteriorated to such an extent due to the ineffectiveness of the EU's response. Thus, one could argue that supranational interference is not capable of resolving backsliding.[171] However, even if the EU cannot cure the cause, it certainly can remedy the symptoms. The EU's ability to halt or slow down backsliding is evident with the regime – even now as its backsliding is very much underway – considering the reversal of one of its flagship policies only to appease the EU and avoid financial sanctions. Therefore, in order for the EU to understand what works, and to avoid making mistakes which render its response ineffective, it is important to consider *why* the tools created with the sole purpose of protecting the EU's values (or the rule of law in particular) have turned out ineffective.

In order to engage in such an assessment, we may recap how the RLF and Article 7 turned out in practice. Vis-à-vis the RLF, we may note how in the face of an openly hostile and uncooperative Member State, the Commission engaged in supervision and issued four separate recommendations, spanning across two years. Such protracted discussions, which

[171] See Uitz (n 144). cf Chapter 3, Section 2.3 in this thesis.

were unforeseen in the Communication establishing the mechanism, led to no change on the ground, but allowed the Commission to gather evidence which was arguably useful in activating Article 7.

As to Article 7, a tool which was supposed to represent an escalation in the EU's response, we may note that the Council's handling of the tool has led to less scrutiny of the events in Poland than that under the RLF.[172] Under Article 7(1) TEU the Council has continued dialogue with Poland (despite such dialogue being ineffective under the RLF), but has failed to issue recommendations or a warning in the three years during which the mechanism has been employed. The Council has therefore exerted minimal pressure against Poland, while the latter has continued its plans of subordinating the judiciary. The frequency and the format of the hearings is also lamentable; it would appear that as the Commission and CJEU have shown increasing concern with the events in Poland, the Council has lost interest. It is therefore possible to argue that the Council is – questionably – delegating the task of values enforcement to other institutions. Therefore, despite the activation of the EU's prime values enforcement tool in December 2017, PiS has continued to consolidate power and subordinate the judiciary. The tool was supposed to prevent further deterioration, but it is difficult to gauge its ability to address backsliding if it is not being used. The Council's negligence – described by some as a 'lack of leadership'[173] – has therefore allowed the situation to decline. Indeed, the fact that the Muzzle Law was passed after the initiation of Article 7(1) TEU proves that the Polish government does not see the mechanism as a real obstacle or threat, which gives some credibility to the claim by Minister Czaputowicz that Article 7 is 'dead'. After all, the preventative arm appears ineffective, and the sanctioning arm of the mechanism has not been initiated.

In sum, both the RLF and Article 7(1) TEU have failed to resolve rule of law backsliding in Poland. The former was incapable of enforcing change, and the latter has not been used effectively. The following chapters will reflect on why this was so.

[172] Various authors, 'NGOs Letter to EU General Affairs Council Concerning Rule of Law in Poland and Hungary (Amnesty International, International Federation for Human Rights, Human Rights Watch, International Commission of Jurists, Open Society European Policy Institute, Reporters Without Borders)' (*Human Rights Watch*, 14 February 2020) <https://www.hrw.org/news/2020/02/14/ngos-letter-eu-general-affairs-council-concerning-rule-law-poland-and-hungary> accessed 21 August 2021.
[173] Bodnar and Filipek (n 138).

Chapter 3: The Rule of Law Framework's Ineffectiveness

1. Introduction

The dialogue under the RLF proved incapable of preventing further deterioration in Poland. Regardless, the Commission continued to issue recommendations for almost two years, during which PiS continuously entrenched itself in power. Bearing this in mind and considering the RLF's two goals – to prevent a deterioration and facilitate the activation of Article 7 – we may start to consider the reasons for the tool's inefficacy, and the lessons to be drawn from the experience.

First, this chapter will consider whether the soft law nature of the RLF was the reason for its failure to prevent a deterioration. In order to illustrate that this criticism has merit – in the context of rule of law backsliding states – the section will proceed to lay out an enforcement spectrum, following which the RLF will be classified as a tool of soft enforcement. Subsequently, it will be argued that given their effectiveness resting on a presumption of compliance, tools of soft enforcement are unsuitable when dealing with backsliding states. Lastly, it will be argued that while the alternative of hard enforcement cannot be a panacea, it is nonetheless a preferable means of enforcement given its greater coercive and deterrent capacity.

The second reason for the ineffectiveness of the RLF relates to the duration of the dialogue under it. The Commission's decision to repeatedly issue recommendations in the face of an openly defiant and uncooperative state has ultimately allowed for further deterioration to occur. Given the clear signal that Poland would not cooperate, the Commission can therefore partly be blamed for the deterioration in Poland as it continued its dialogue irrespective of Poland's recalcitrance. However, that is not to say that the use of the RLF was completely unfounded. Indeed, given the challenges of utilising Article 7, and the RLF's aim as supplementing its activation, one could go as far as to say that the RLF was crucial for the

escalation of the EU's response. Accordingly, the section will first illustrate the utility in the use of the RLF for the legitimate activation of Article 7 TEU. However, the decision to engage in protracted discussions allowed PiS to further entrench itself in power, and therefore weakened the EU's ability to enforce its values. Therefore, secondly, the problem with delays will be considered. Lastly, the problems with the RLF's construction will be considered, highlighting how its discretionary nature and lack of strict time frames for the escalation of the tool permitted the Commission to refrain from escalating the EU's response.

2. The Framework's first goal: preventing a deterioration

The RLF's first goal to prevent deterioration of a systemic threat to the rule of law was not achieved. It is argued that this inefficacy is attributable to the tool's soft law nature.

In an attempt to prove this is so, this section will first provide a theoretical framework of enforcement, distinguishing between soft and hard enforcement. Subsequently, it will be illustrated that the RLF falls into the soft enforcement category.

Secondly, it will be argued that soft enforcement faces a near insurmountable obstacle if it tries to enforce norms against rule of law backsliding states, given their recalcitrant nature.

Thirdly, it will be argued that hard enforcement is more suitable at enforcing norms in the aforementioned context as it is capable of exerting sufficient pressure so as to deter or halt a violation. While this assessment is not definitive, especially given the narrow scope of this thesis, it is argued that given the failure of the RLF (and Article 7(1)TEU), the EU ought to stop placing its faith in dialogic tools and be more responsive to the uncooperative nature of backsliding states.

2.1 Enforcement Spectrum

Soft law refers to 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects', and in some cases may possess 'legal effects.'[1] In the context of EU law, soft law comprises 'instruments deprived of legally binding force in accordance with Article 288 TFEU'. This includes recommendations which can be issued under the preventative arm of Article 7 by the Council, or those issued by the Commission under the

[1] Oana Ştefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 200.

RLF. Communications – such as the one issued by the Commission to create the RLF – are also soft law.[2] In contrast, '[h]ard law is endowed with binding legal force, produces general and external effects, is adopted by the Union institutions according to specific procedures, and has a legal basis in the Treaty.'[3] Generally speaking, for its enforcement, the former relies on 'persuasion and guidance' whereas the latter allows for 'enforcement by a coercive authority'.[4]

International relations literature has devised various typologies which help to distinguish between these two sources of law, with Ştefan arguing that 'the main differentiating features between hard and soft law lie in the capacity of the norm to prescribe legally binding commitments, the clarity and precision of its terms, and its enforceability.'[5] However, given that the focus of the criticism concerning the RLF's inability to lead to change (given Poland's reluctance to cooperate), targets its enforcement capacity, it is only on this aspect that we will focus.

The softer side of the enforcement spectrum is defined in literature as a 'compliance' or 'management' strategy.[6] Ştefan highlights that 'enforcement through compliance focuses on cooperation, persuasion, and advice. Compliance is achieved because states undertake commitments in the interests of efficiency and norms, and occurs through clear and transparent norms, economic and political capacity building, and rules interpretation.'[7] A similar account of enforcement is presented by Conant, under the heading of the 'management approach'. The assumption being that States will generally respect their international commitments, and if they do not, such non-compliance is likely a result of 'capacity limitations and ambiguities of interpretation rather than deliberate defiance.'[8] Soft law is therefore preferred due to its clarificatory benefits, and coercive means of enforcement

[2] ibid. See Article 288 TFEU; Artur Nowak-Far, 'The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) 320-321.
[3] Ştefan (n 1) 201.
[4] ibid.
[5] Ştefan (n 1) 211-212.
[6] See respectively, Ştefan (n 1), Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012).
[7] Ştefan (n 1) 204. More generally, see Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) ICLQ 901, 911.
[8] Conant (n 6) 7-8.

are not perceived as necessary. Accordingly, on the softer side of the enforcement spectrum dialogic and clarificatory tools are preferred, with the assumption being that States are committed to upholding their obligations. These approaches assume that adherence to norms and values can be ensured gradually, 'by the intervention of certain devices other than the legal force of an act, such as those related to knowledge and meaning making', thereby instilling a commitment to such values.[9] In order to avoid confusion with alternating terminologies, this type of enforcement will simply be referred to as soft enforcement.

The alternative means of enforcement in the literature have been described as 'deterrence' or 'enforcement' strategies.[10] On this account the expectation is that States will prioritise their interests above their international commitments. In the words of Conant:

> Enforcement theorists expect that free-riding is a paramount concern for compliance with international regulation because each state gains most if others comply while it reneges on commitments. The assumption is that states choose to cheat whenever the benefits of shirking outweigh its costs.[11]

This approach is therefore based on the opposite assumption to soft enforcement approaches and expects States to breach their international commitments if such defiance would be of greater benefit to them. To resolve this problem, institutions are set up in order to:

> increase the probability of detection and the costs of cheating. Investing in monitoring and sanctioning helps to expose and punish cheaters, increasing the costs of non-compliance and thereby reducing its incidence.[12]

Therefore, on the opposite end of the enforcement spectrum there is an understanding that States are selfish, and they must be deterred from deviating from their commitments through

[9] See also Matej Avbelj and others, 'EU Soft Law in the EU Legal Order: A Literature Review' (SoLAR Working Paper Forthcoming) 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629> accessed 24 August 2021. See also Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) MLR 853, 871; Armin von Bogdandy, Carlino Antpöhler, and Michael Ioannidis, 'Protecting EU Values: Reverse *Solange* and the Rule of Law Framework' in András Jakab and Dimitry Kochenov (n 1), 228; Anna di Robilant, 'Genealogies of Soft Law' (2013) 58 Scan Stud L 217, 225.

[10] See respectively, Ştefan (n 1) and Conant (n 6).

[11] Conant (n 6). 7.

[12] ibid.

coercive and confrontational means, so as to outweigh the costs of defiance.[13] Instead of relying on dialogic and soft means of enforcement, these tools are likely to take the form of sanctions – be they financial, diplomatic or otherwise. Once more, for simplicity's sake, this type of enforcement will be encapsulated under the broader term of hard enforcement.

While the soft-hard enforcement dichotomy will be used to assess the RLF's enforcement capacity, it is important to acknowledge that increasingly tools of enforcement are not *either* soft *or* hard.[14] A 'hybrid' theory explains that various factors affect how states act, which makes it difficult to categorise them as simply *defiant* or *compliant*, thereby distorting the picture presented by either of the two enforcement types illustrated above.[15] Accordingly, enforcement tools often draw from both *soft* and *hard* strategies, so as to increase the compliance through norm clarification, which may ultimately lead to harsher sanctions and deter violations.[16] Such hybrid models attempt to acknowledge the nuance of international governance and attempt to maximise effectiveness of enforcement by maintaining a flexible approach. Article 7 would appear to slide perfectly into this category. It is a hard law tool, with its basis in the Treaty, and enforceable by the EU's institutions. However, its preventative arm appears to reflect a 'soft enforcement' approach, with the mechanism only able to issue a warning and recommendations which are capable of exerting political pressure and may lead to other indirect repercussion on the Member State concerned,[17] but there is nothing under Article 7(1) TEU that could lead to sanctions. As per Article 288 TFEU, recommendations issued by the Council are non-binding acts, and the warning issued by the Council at the conclusion of Article 7(1) also constitutes no more than a denouncement. The tool's sanctioning arm, on the other hand, after the determination under Article 7(2) TEU (which may also be categorised as a softer kind of enforcement since it is merely a denouncement),[18] may lead to an actual imposition of sanctions and it is this part of the mechanism that

[13] Ştefan (n 1) 204.
[14] ibid 212-213.
[15] Conant (n 6) 13-14.
[16] See Ştefan (n 1) 202, 204; Di Robilant (n 9) 225; Conant (n 6) 8.
[17] See Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*Verfassungsblog,* 23 December 2017) <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> accessed 24 August 2021; Matteo Bonelli, 'A Union of Values: Safeguarding Democracy, the Rule of Law and Human Rights in the EU Member States' (PhD thesis, Maastricht University 2019) 186.
[18] For possible implications of this denouncement, see ibid 186.

possesses a *hard enforcement* element. Thus, while Article 7 is a legal mechanism, representing hard law, its enforcement capacity is a blend of both soft and hard enforcement.

For our purposes, however, while it is acknowledged that some overlap is inevitable, we will focus on the two opposite accounts of enforcement. The following section therefore classify the RLF as a tool of *soft enforcement*.

2.1.1 The Rule of Law Framework as a soft enforcement tool

The RLF is a monitoring, supervisory and dialogic tool. The Commission's dialogue aimed to illustrate to the Member State concerned the threat posed to the rule of law, with the hope that this would be sufficient in encouraging the State to resolve its violations before any escalation would be necessary. Furthermore, the Commission's recommendations are 'not binding legal acts, [and] the Commission will not be able to bring an action against the Member States concerned (under Article 258 TFEU [the infringements procedure]) for not fulfilling them.'[19] Thus in order to be effective – and implement its first goal of preventing a deterioration on the ground – the RLF can only encourage change through dialogue. A Member State is encouraged (but not obligated) to engage in this dialogue with the Commission, and it may not in any case be obligated to enforce the Commission's recommendations.[20]

In order to narrow the focus to an assessment relevant and specific to the RLF, a number of observations regarding its enforcement capacity must be made.

First, the RLF – unlike certain soft law mechanisms ordinarily found under international law – is not made under a treaty between contracting states.[21] It was unilaterally created by the Commission through a 'communication' – an instrument lacking legally binding force, allowing the Commission to *inter alia* clarify how provisions of EU law and policy ought to be interpreted and applied.[22] The main consequence of non-compliance with the Commission's

[19] Nowak-Far (n 2) 322.
[20] Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512, 529; Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Von Bogdandy and others (n 2) 140.
[21] On an assessment of compliance with international soft law agreements between States, see Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2 J Legal Anal 171.
[22] Linda AJ Senden, 'Soft law and its implications for institutional balance in the EC' (2005) 1(2) Utrecht Law Review 79, 81-82.

recommendations under the RLF is a possible initiation of Article 7(1) TEU. The tool has therefore aptly been described by Hillion as a 'pre-preventative' procedure;[23] the non-compliance with the RLF leads to another dialogic mechanism which, although more capable of exerting pressure, still does not encompass any sanctioning capacity.[24] One could therefore argue that it is a tool capable of exerting only limited political pressure on the Member State.[25]

Secondly, the recommendations made under the RLF were not enforced by the CJEU. This may have stemmed from a belief 'that use of soft law instruments in court is undesirable', given their often vague and aspiratory provisions which could undermine legal certainty if enforced judicially.[26] In response to such claims, one could argue that the Commission's recommendations were sufficiently specific as to what was expected from Member States, in contrast to soft law treaties in international law which may contain somewhat aspiratory and imprecise language.[27] However, while the specificity of the instructions in the recommendations may not have been an issue, the judicial enforcement of non-binding instruments could nonetheless be problematic,[28] as it could amount to 'fostering illegitimate decision making' which could exacerbate the criticisms over the EU's democratic deficit.[29] Therefore, simply put, judicial enforcement of provisions lacking legally binding force becomes problematic.[30] Some exceptions to this rule exist in the context of EU law, such as where the soft tool is 'considered binding at the discretion of the enacting institution' or where soft law was 'negotiated' between states thereby making it possible to argue that the tool possesses a binding aspect.[31] These arguments, however, do not apply in the context of

[23] Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 79.
[24] Dimitry Kochenov and Laurent Pech, 'Better Late than Never: On the European Commission's Rule of Law Framework and Its First Activation' (2016) 54 J Common Mkt Stud 1062, 1071.
[25] cf Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1089; von Bogdandy, Antpöhler, and Ioannidis (n 9) 228.
[26] See Ştefan (n 1) 202; Jan Klabbers, 'Informal Instruments Before the European Court of Justice' (1994) 31(5) CML Rev 997; Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) ICLQ 850, 862.
[27] Chinkin (n 26) 825-5.
[28] See Ştefan (n 1) 203-204, 207-208
[29] ibid 216.
[30] Chinkin (n 26) 862-3.
[31] Ştefan (n 1) 207.

the RLF as it was not deemed binding by the Commission, nor was it agreed upon by States. The RLF may therefore be described as incapable of judicial enforcement.

Given this assessment we may relatively uncontroversially categorise the RLF as a soft enforcement tool – it lacked a legally binding aspect, was not judicially enforceable, and therefore rested almost exclusively on the belief that recommendations and dialogue would be sufficient at persuading States to correct their behaviour.

We may now consider whether the RLF's failure to induce change in a defiant State lies in its soft enforcement capacity.

2.2 Soft enforcement as a response to the rule of law crisis

The key criticism regarding the RLF's enforcement capacity can be summarised as follows.[32]

The RLF's soft enforcement capacity rests on an assumption of compliance. The tool lacks a deterrent aspect, instead placing its faith completely in dialogic and discursive means of enforcement, the belief being that pressure exerted through such dialogue will in itself be sufficient to steer a Member State in the right direction. This is not completely unfounded given State compliance with EU law is ultimately voluntary.[33] Therefore, since the EU cannot amend domestic constitutions or domestic legislation, one may argue that the most effective form of supra-national interference comes in the form of dialogue, political pressure, or other such approaches which aim to strengthen the capacity of domestic institutions to resolve the problem at its very core.[34] The practical implications of this assumption are however problematic. In the words of Niklewicz:

> Apparently, the Commission believed that any rule-of-law crises to be addressed by the [RLF] could only result from unintentional mistakes, poor interpretations and so on, on the part of the government in question. At the same time, the Commission seemed to believe that governments would act in good faith and that they would be willing, in the end, to adhere to… basic tenants of liberal democracy. It is highly probable that no one in Brussels expected a situation where a member-state

[32] See Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3, 6-7, 27.
[33] See Bieber and Maiani (n 25) 1060-61.
[34] See Günter Wilms, 'Protecting fundamental values in the European Union through the rule of law: Articles 2 and 7 TEU from a legal, historical and comparative angle' (EUI 2017) 73.

> government's deeply nested and fully embraced intention was to act against the essence of liberal democracy.[35]

Arguably, the RLF was therefore based on the presumption that States could never purposefully aim to undermine the EU's values, thereby operating under the presumption that dialogue under the RLF will work as it would highlight the issues to States who would then cooperate with the monitoring institution (the European Commission). In other words, the RLF was based on an assumption of compliance – a belief that Member States would cooperate.

One may therefore notice that problems arise if a Member State is unwilling to engage in this dialogue, as the tool is incapable of enforcing compliance.[36] Soft law therefore is likely to have a negligible impact – at least in the short term when arguably it is most important to take action before regimes entrench themselves in power[37] – if it is faced with uncooperative States. Problematically, the tool was used against Poland, a State whose regime is wilfully and persistently set on dismantling checks on its power. It was therefore committed to its backsliding, 'regardless of the political cost'; it also helped that it was convinced that the RLF and Article 7 were mere 'paper tigers'.[38] Nowak-Far is therefore correct when he states that recommendations issued by the Commission could be 'disregard[ed]' by the 'Member States concerned, if only [they were] determined enough', as Poland has shown.[39]

Accordingly, reliance on soft enforcement is argued to be of questionable use in the context of the rule of law crisis. The assumption of compliance upon which these tools are based appears to be incompatible with the reality of persistently recalcitrant backsliding states. Such tools are therefore unequipped to enforce norms when faced with persistently defiant states.[40] In short – soft enforcement does not work if both sides are not equally committed

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[35] Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' (2017) 16 EurView 281, 286.
[36] Kochenov and Pech 2015 (n 20) 534.
[37] See Section 3.2 of this chapter. See also Pech and Scheppele 2017 (n 32) 6-7.
[38] Nicklewicz (n 35) 285.
[39] Nowak-Far (n 2) 322.
[40] Kochenov and Pech 2015 (n 20) 532, 535; Kochenov and Pech 2016 (n 24) 1066-1067; Pech and Scheppele 2017 (n 32) 6, 27. See also Di Robilant (n 9) 225; Renáta Uitz, 'EU Rule of Law Dialogues: Risks – in Context' (*Verfassungsblog,* 23 January 2020) <https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/> accessed 26 August 2021.

to finding a solution through dialogue and cooperation. The tool was therefore correctly criticised for 'its likely ineffectiveness' from the outset.[41]

This argument certainly appears to be supported by how the tool was implemented – Poland ignored the Commission's recommendations, denounced the Commission's interferences, and continued its rule of law deterioration despite the activation of the mechanism, unafraid of the consequences associated with non-compliance.

That is not to say that soft enforcement is redundant and should not be used if one expects it to fail. Wilms highlights that 'the European Union is a community based on trust in the compliance of Member States.'[42] The EU's basis in mutual trust rests on the assumption that all Member States are going to comply with EU law, and the suspension of this principle is *only* permitted in 'exceptional circumstances.'[43] Wilms therefore argues that even if one expected Poland to ignore the Commission's recommendations under the RLF, the high thresholds for disapplying the principle of mutual trust is reason enough for the Commission to nonetheless use it. A refusal to do so, he argues, would amount to suspension of this fundamental principle, and would be 'badly advised', amounting 'to repeating the mistakes made in the [Haider affair]'.[44] It is possible to question whether this argument truly applies to the RLF, given that the initiation of Article 7 would likely have started with its preventative arm, where the State has a right to be heard, and which in any case does not lead to any sanctioning as was the case in the Haider affair. Nonetheless, the argument does highlight the importance of dialogic tools given the EU's foundation in the concept of mutual trust. The EU is based on the assumption of compliance, and therefore it is possible to argue that to ensure its actions are legitimate, the EU ought to resort to tools of soft enforcement first.

This point, however, does not undermine the aforementioned analysis regarding tools of soft enforcement. If anything, it strengthens the criticism levelled against the RLF: since the EU *is* based on an assumption of compliance, it appears to be in an inherently disadvantageous position, as it is reluctant to acknowledge the lack of cooperation from backsliding states. In

[41] Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 214.
[42] Wilms (n 34) 80; *Opinion 2/13 on Accession to the ECHR* EU:C:2014:2454, para 168.
[43] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* EU:C:2016:198, para 82; *Opinion 2/13* (n 42), para 191.
[44] Wilms (n 34) 80.

turn, the EU is limiting its capacity to address backsliding by having to resort to tools which reflect the presumption of compliance (or mutual trust).

2.3 Hard enforcement as a response to the rule of law crisis

Unlike soft enforcement, hard enforcement theories presuppose that States will act in a way which benefits them – therefore regardless of the value or importance of a norm enforced, a state will implement or ignore it depending on the benefit gained.[45] In practice, such a perspective may be an oversimplification, as not all states can be cast through such a prism,[46] but it is argued that this approach is more appropriate in the context of the rule of law crisis where states are committed to their illiberal goals and it would appear that little can be done from dissuading them from carrying them out – after all, a government able and willing to undermine the independence of its entire judiciary in a meticulous and time-consuming process is unlikely to respond to arguments rationalising the importance of the rule of law.

Hard enforcement theories are therefore based on the assumption that the cost of non-compliance with a norm must outweigh the cost of compliance.[47] In the context of the rule of law crisis, this would translate to an enforcement mechanism containing sufficiently robust coercive and deterrent means so as to force a state to halt its backsliding and restore the functioning of the rule of law.

The crux of the matter can therefore be formulated as follows: is a sanctioned norm more likely to be enforced than a non-sanctioned norm?

To begin answering this question we could argue that '[t]he key distinction between hard and soft law is that the former imposes greater costs on the violating state than does the latter. This gives hard law greater "compliance pull" than soft law.'[48] A norm is therefore complied

[45] See Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 AJIL Unbound 163, 164.
[46] See Conant (n 6) 8.
[47] Hofer (n 45) 165.
[48] Guzman and Meyer (n 21) 177; Carlos Closa, 'Securing Compliance with Democracy Requirements in Regional Organizations' in András Jakab and Dimitry Kochenov (n 1) 382.

with when the cost of non-compliance is too high.[49] Oftentimes this takes the form of sanctions.[50]

While not conclusive, one may consider the fact that on the few occasions where Poland did halt its unlawful activity (even if only temporarily), this was often accompanied by increased pressure. In 2017 Poland was ordered to halt its illegal logging activity in the Białowieża Forest by the CJEU. Poland did not cooperate. In response, the CJEU construed its powers under Article 279 TFEU in a way which made the imposition of financial sanctions a possibility. The Court argued it was necessary for it to be able to adopt 'any measure intended to ensure that the interim order is complied with by that party. Such a measure may entail, *inter alia*, provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party.'[51] This interpretation of Article 279 TFUE was necessary to 'guarantee the effective application of EU law, such application being an essential component of the rule of law… on which the European Union is founded.'[52] In turn, Poland conceded.

> The threat of periodic penalty payments of at least EUR 100,000 per day convinced the Polish government to comply with the interim measure, not only in the Białowieza Forest case in November 2017, but almost a year later in a [SC] case [concerning forced retirements].[53]

Furthermore, Poland's recent willingness to rework the DC after the Commission threatened financial penalties under Article 260 TFEU following Poland's initially hostile response to the July 2021 decisions of the CJEU supports this argument further. These episodes illustrate how an increase in pressure via hard enforcement may be capable of deterring further violations. They highlight that a sufficient amount of deterrence and pressure may produce positive results. We could attribute this policy reversal to the importance of financial considerations

[49] Guzman and Meyer (n 21) 193. See also Bojan Bugarič, 'The Right to Democracy in a Populist Era' (2018) 112 AJIL Unbound 79, 82-83.
[50] Hofer (n 45) 163.
[51] Case C-441/17R *Commission v Poland (Białowieża Forest)* EU:C:2017:877, paras 99-100.
[52] ibid, para 102.
[53] Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 YB Eur L 3, 57, 114. See also Tomasz Tadeusz Koncewicz, 'Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of Heart' (2019) 26 Ind J Global Legal Studies 501, 587-594.

to Poland – it is one of the main net beneficiaries of EU funds, and as such financial sanctions can serve as a real deterrent due to the very real consequences felt by the Member State.[54] Financial sanctions may therefore amount to increasing the cost of non-compliance to such an extent so as to force Poland into compliance.[55]

This argument is reaffirmed when considering Poland's failure to comply with the April 2020 interim relief order. Given that controlling judicial decision-making via the threat of facing disciplinary proceedings was a crucial tool for the regime's subordination of the judiciary, and given that no financial penalties were threatened after Poland's failure to comply with that interim relief order,[56] we could argue that the cost of defiance (abolishing a flagship backsliding piece of legislation) outweighed the benefits in compliance (avoiding criticism, political pressure and denouncements from the EU). In other words, the regime does not have a problem with being denounced and criticised, and that is a cost it is willing to pay for continuing its backsliding. The lack of financial sanctions has therefore meant that the cost of compliance could not match the cost of defiance.

While this is merely a hypothesis, and the evidence may therefore be inconclusive, the fact that Poland's withdrawal regarding the Białowieża forest, SC forced retirements, and now the DC – as examples of the few instances where they actually did comply with EU pressure – coincided with a threat of imposition of financial sanctions, it may be possible to argue that hard means of enforcement are more effective at ensuring compliance than softer means of enforcement. Indeed, none of the Commission's recommendations under the RLF (or hearings under Article 7(1)) had a similar impact. The argument that a form of deterrence is required when faced with a defiant and uncooperative State is not outlandish and has a degree of empirical evidence to support it, compared to the ineffectiveness of the RLF.

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[54] Piotr Bogdanowicz and Matthias Schmidt, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55(4) CML Rev 1061, 1074-1075. See also Bugarič, 2018 (n 49) 82.

[55] Pech and Scheppele 2017 (n 32) 42-43. See also, Julinda Beqiraj, 'The "Regulation on a general regime of conditionality for the protection of the Union budget" and its contested implementation' (*RECONNECT*, 19 January 2021) <https://reconnect-europe.eu/blog/the-regulation-on-a-general-regime-of-conditionality-for-the-protection-of-the-union-budget-and-its-contested-implementation/> accessed 27 August 2021.

[56] Adam Bodnar and Paweł Filipek, 'Time is of the Essence' (*Verfassungsblog,* 30 November 2020) <https://verfassungsblog.de/time-is-of-the-essence/> accessed 24 August 2021.

However, the literature surrounding compliance with sanctioned norms is not unequivocal, and as the following section will illustrate, its success need not be guaranteed.

2.3.1 The difficulties of hard enforcement

While soft enforcement is likely to be ineffective against uncooperative states, the argument that it is bound to produce weaker results than hard enforcement is open to debate.[57] Despite speaking in a domestic context, McHarg points out that while hard law enforcement may *prima facie* appear more effective,[58] upon further consideration 'the strength of legal sanctions is highly variable, depending on the nature of the penalty in question, the likelihood of enforcement, the ease or difficulty of proof [et al]'.[59] Thus, in practice, the initially threatening hard law sanctions may become ineffective if they are incapable of enforcement. It is not difficult to see this argument translate to the EU's enforcement tools, as Article 7, despite its potential of imposing extensive sanctions, may have been neutered due to its perception as a tool too damaging to use and too uncertain to enforce. As the following chapter will illustrate, given the apathy of Member States towards Poland's violations as seen in the context of Article 7(1) hearings, the unanimity threshold of Article 7(2) TEU is very unlikely to be met (Hungary's veto possibility notwithstanding), and as such Poland has been openly defying EU law in the knowledge that its actions are likely to go unpunished. Thus, while in theory Article 7's sanctioning arm is capable of greater effect than the RLF or Article 7(1) TEU, this is negated if the tool is incapable of enforcement itself. Soft law tools which rely on 'moral and political pressure',[60] might therefore possibly produce greater effects if the choice is between inactivity (of hard enforcement) and some pressure (via soft enforcement).[61]

However, in response to this one could argue that the problem is not with hard enforcement *per se*, but with hard enforcement which is unreasonably qualified. Indeed, threats of actual financial penalties imposed by the CJEU and the Commission have shown to produce results. Effective sanctioning tools must therefore not only be capable of imposing sanctions in

[57] McHarg (n 9) 865; Bieber and Maiani (n 25) 1091-1092.
[58] McHarg (ibid) 870-871.
[59] ibid 871.
[60] ibid 870-871.
[61] See Wilms (n 34) 80-81.

theory, but they must also be capable of imposing them in practice.[62] If deterrence tools lie dormant and are not used, it should not be surprising when they fail to convince a defiant state to comply with a norm.

But here we face a new problem, as highlighted by Hofer, who argued that:

> even if sanctions have successfully inflicted the desired costs, this does not mean that the targeted actor will cave and act according to the wishes of the sanctioning state. If behavioral change is the primary objective for international lawyers, in political science there is a general consensus that coercive sanctions are generally a "failure" in terms of their ability to change behavior (and this in spite of the diversity of sanctions studies).[63]

Indeed, States may consider various reasons for compliance with a sanctioned norm.[64] While speaking in the context of international law and inter-state sanctions, Hofer points out a series of reasons as to why states may refuse to comply with sanctions. For instance, if sanctions are perceived as posing 'a threat to its identity; [the state] might perceive that it is not being sanctioned for what it has done but for who it is. Under these circumstances the political cost of compliance is likely to be too high.'[65] Similarly, the State must view the sanctions and the sanctioning body as legitimate. If the sanctioned state perceives the measures imposed on it as 'unfair' it may 'resist compliance with the sanctioning state's demands.' Therefore, a 'States' sense of identity and the norms they wish to uphold in their international relations have led sanctioned actors to declare that such measures are illegitimate. [In such circumstances] [n]oncompliance becomes a form of resistance against an illegitimate act.'[66] Applying this to the rule of law crisis, one may see how even the imposition of sanctions as a way to ensure compliance becomes problematic. Indeed, Poland has been described by

[62] See Hofer (n 45) 165; Madeleine K Albright, 'Enforcing International Law' (1995) 89 ASIL PROC 574, 576-577. On the rendering of the infringements procedure more operable see Scheppele, Kochenov and Grabowska-Moroz (n 53) 116.
[63] Hofer (n 45) 165, 168.
[64] ibid 165.
[65] ibid 166
[66] ibid 166

Scheppele as ideologically committed to its backsliding.[67] If the governing officials therefore truly believe in a different conception of the rule of law,[68] attempts at its enforcement may be ineffective. Furthermore, Poland has repeatedly declared the EU's denouncements and criticisms as unfounded, illegitimate, and ideological.[69] Therefore, in the context of the rule of law crisis, where states are committed to their backsliding, it may be possible that even harder forms of enforcement will be ineffective.

What is worse, if the sanctioned state finds these sanctions as unfounded, it may 'reject the norms being enforced and seek solidarity among other deviant actors.'[70] In that sense, the sanctioning of a state so as to discourage further deviation, may have the opposite effect to that intended, and lead to further violations and deterioration. Indeed, one may see the EU's constant denouncements of Poland – albeit not in a sanctioning capacity – leading to the alienation of the Polish government, pushing it into 'Russia's sphere of influence' as predicted by Bugarič.[71] Indeed, Poland has expressed interest in the formation of a new political grouping in the European Parliament with *inter alia* Hungary's Orbán and Italy's Salvini, both of whom have positive and relatively strong relations with Russia.[72] Even if this does not reflect a true pro-Russian alliance in the EU, the possible formation of such a political grouping could reflect a more united and profound opposition to the EU's commitment to Article 2 TEU values. Therefore, an argument could be made that if the EU had done more than just criticise the events in Poland, this could lead to even further alienation from the EU and the values it aims to uphold.

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[67] See Kim Lane Scheppele, Sergey Lagodinsky and Lennart Kokott, 'LawRules #12: We need to talk about Financial Sanctions' (*Verfassungsblog*, 9 December 2020) <https://verfassungsblog.de/lawrules-12-we-need-to-talk-about-financial-sanctions/> accessed 25 August 2021.

[68] On a justification of the backsliding in Poland in its early stages, see Lech Morawski, 'The Polish Constitutional Crisis and Institutional Self-Defence' (University of Oxford, 9 May 2017) <http://trybunal.gov.pl/fileadmin/content/uroczystosci_spotkania_wizyty/2017/2017_05_09_Oxford/Wystapienie_prof._L.Morawskiego_w_Oxfordzie.pdf> accessed 22 August 2020.

[69] See Niklewicz (n 35) 284.

[70] Hofer (n 45) 166-167.

[71] However, Bugarič was referring to alienation as a response to Article 7(3) sanctions and not, as has been alluded to, alienation resulting from stigmatisation. Bugarič, 2018 (n 49) 82.

[72] Marton Dunai and Joanna Plucinska, 'Hungary, Poland, Italy leaders seek new European right-wing core' (*Reuters*, 1 April 2021) <https://www.reuters.com/article/eu-politics-hungary-poland-italy-idUSL8N2LU3GM> accessed 27 August 2021.

However, given the failure of the EU's hitherto soft enforcement approach, it is argued that by failing to resort to harder means of enforcement the EU would consciously be rendering itself powerless. Thus, the appeal in favour of stronger means of enforcement – even if the risks associated with it are true – may be formulated as follows.

The RLF was unable to persuade Poland to reverse or even halt its backsliding, and it is therefore possible to conclude that the RLF's first goal of preventing a deterioration was going to be unattainable given the uncooperative nature of backsliding regimes. It would appear that these states cannot be sufficiently compelled to comply with norms enforced via soft means. We may also note that the situation in Poland continued to deteriorate after the initiation of Article 7's preventative arm which also lacks a sanctioning component.

Furthermore, the literature on enforcement mechanisms highlights how soft law can often turn into hard law, thereby increasing its enforceability in the process. This transition appears to support the claims of supporters of harder means of enforcement, which favour them due to their greater 'compliance pull'. Indeed, the acknowledgment and praise attributed to soft law's capacity to turn into hard law,[73] it is argued, could be construed as an acknowledgment that soft enforcement may not always be effective, and in such circumstances, more deterrent means of enforcement are required.

It is true that hard enforcement may not be a panacea:[74] sanctions may risk alienating States and could produce feelings of resentment or retaliation and in any case their success is not guaranteed. Despite these concerns, however, a degree of empirical evidence – at least in the Polish context – appears to strengthen the case in favour of hard enforcement. Indeed, the EU has in the past succeeded at dissuading Poland's violation of EU law and values via threats of financial penalties. Crucially, if the regime does rework or abolish the DC following the EU's threats of financial penalties under Article 260 TFEU in July 2021, after having ignored the April 2020 interim relief order which lacked financial penalties, this will arguably support the case in favour of hard enforcement when dealing with defiant States. It will illustrate that if the EU can muster the strength to sanction conduct which goes against its very values and functioning, it can succeed at slowing down the backsliding. Sanctions under infringement

[73] Ştefan (n 1) 211.
[74] See Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa and Dimitry Kochenov (n 23) 99.

proceedings may not, however, resolve the threats completely. They focus on particular violations and therefore do not address cumulative violations, or provide comprehensive remedies, to backsliding.[75] However, infringement proceedings where financial sanctions have been threatened highlight the crucial role which the EU can play through hard enforcement. The EU can slow down the deterioration through the mere *threat* of imposing financial penalties under Article 260 TFEU. It has not yet resorted to the imposition of sanctions through Article 7(3) TEU, Article 279 TFEU or Article 260 TFEU. One may assume that if the EU is able and willing to use its sanctioning tools, it may raise the stakes of defiance to the stage where further violations will not appear worthwhile to the regimes.

Therefore, given the gravity of the threat faced by the EU, and given the failure of the hitherto soft enforcement approach, it is argued that hard enforcement is worth exploring, and soft enforcement ought to be refrained from. Poland is committing serious violations of EU law and dialogic tools are preventative – once a serious violation occurs (and persists), there is little that they may achieve on the ground, especially if the actors are uncooperative. Simply put, if both types of enforcement are going to fail, then *at least* they should both be tried out first. The EU has tried the soft enforcement route. Perhaps the other option – if the EU is truly committed to protecting the rule of law – is to meaningfully escalate its response.

3. The Framework's second goal: supplementing Article 7

After two years of dialogue under the RLF the Commission finally activated Article 7(1) TEU. Whether or not Article 7(1) could have been initiated against Poland without the Commission's four recommendations is unclear. After all, the European Parliament did initiate the preventative arm of Article 7 against Hungary a year after the Commission's initiation against Poland, without Hungary ever being subjected to the RLF. However, given the nuclear perception of Article 7 and the associated reluctance to use it, there is room to argue that the RLF 'resulted in the accumulation of overwhelming, damning evidence'[76] crucial to the

[75] This being one of the reasons why Scheppele has proposed to reinterpret the procedure so as to allow for addressing of cumulative violations. See, most recently, Scheppele, Kochenov and Grabowska-Moroz (n 53).

[76] Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> accessed 25 August 2021.

activation of Article 7. Thus, while the RLF operates outside of Article 7's legal framework,[77] the Commission's assessments arguably helped to achieve the RLF's subsidiary goal of strengthening its activation.[78]

Nonetheless, while the RLF may have strengthened the possibility of activating Article 7, the duration of the dialogue was excessive, and it gave PiS additional time to entrench itself in power. Thus, the failure of the Commission to escalate the EU's response in a timely manner – so that the situation in Poland could be addressed with more appropriate mechanisms – is argued to be the second major challenge to the effectiveness of the RLF. This is because it weakened the EU's ability to resolve backsliding, and therefore inadvertently contributed to further deterioration.

In order to illustrate the second major challenge to the effectiveness of the RLF, this section will first illustrate why assessments under the RLF were arguably important for the escalation of the EU's response. However, while dialogue may have been useful and relevant for a legitimate escalation of the EU's response, this does not justify *protracted* dialogue. Thus, secondly, it will be highlighted how protracted discussions and the Commission's failure to escalate its response weakened the EU's ability to resolve backsliding. More concretely, the problem will be argued to lie with the tool's discretionary nature which did not guarantee the activation of Article 7 or impose strict time frames between each of its stages.

3.1 The utility in dialogue

Wilms highlighted why – from an efficacy perspective – it may have been prudent to engage in dialogue. In discussing the difficulties of activating Article 7's mechanisms, he highlighted that both over and under-enforcement of Article 7 carries with it 'considerable risks.'[79] If the Commission initiated Article 7(1) TEU against a Member State, but the Council voted against the claim that the Member State had committed a 'clear risk of a serious breach', perhaps because the Commission could not produce sufficient evidence in support of its claim or because States in the Council were simply unwilling to criticise and sanction each other, this could lead to serious 'political damage'.[80] It could reinforce the idea that Article 7 is ineffective

[77] Hillion (n 23) 78.
[78] Bieber and Maiani (n 25) 1089. See also Commission, 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' (Communication) COM/2019/163 final, 9.
[79] Wilms (n 34) 68.
[80] This argument also applies to Article 7(2) TEU. See Wilms (ibid) 68. See also Chapter 4, Section 3.2.

and unusable, creating a similar attitude to that which surrounded Article 7 after the Haider affair, and '[w]hat is probably still worse is that a negative decision would give additional legitimacy to the respective Member State, who would thence be confirmed in its "illiberal" course.'[81] Conversely, under-enforcement, viz., a purposeful decision refraining from activating Article 7 due to fear that not enough information can be gathered to prove that the thresholds of Article 7 had been met – when in fact the 'formal and substantial requirements' are likely to be met – may cause equally serious damage. It may encourage other States to violate the EU's values, seeing that the original State had not faced punishment for its actions, or it could be 'understood as equivalent to an endorsement of the situation in the Member State concerned'.[82] A monitoring and supervisory tool, permitting the accumulation of evidence was therefore crucial.[83] Had the Commission failed to provide sufficient evidence of the violations in Poland, if it then lost in the Council, the tool would have been rendered unusable and the EU's enforcement capacity via its strongest enforcement tool would have been neutered.

At this stage, one may argue that Article 7's preventative arm was to fix this very problem. It could thus appear that the RLF constitutes an unnecessary 'duplication',[84] inducing further delay before Article 7 could be initiated, as its critics had highlighted.[85]

However, while it is true that the RLF is a duplication of Article 7's preventative arm, it crucially is not an identical copy as it is controlled not by Member States, but by the Commission, which in turn improves it as a monitoring tool. The RLF is a mechanism allowing for dialogue between the Commission and the Member State, with the possibility to issue non-binding recommendations, which may escalate and lead to the activation of Article 7(1) TEU. This subsequent mechanism, much like the RLF, is aimed at fostering dialogue, but this time with the involvement of the other Member States in the Council. The main difference being that

[81] Wilms (ibid) 68.
[82] ibid 69.
[83] ibid 69.
[84] See Gábor Halmai, 'How the EU Can and Should Cope with Illiberal Member States' (2018) 38(2) Quaderni Constituzionali 313, 335.
[85] Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 Trinity CL Rev 35, 43-44; Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) EUI Working Paper No LAW 2017/10, 8-9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965087> accessed 24 August 2021. cf Wilms (n 34) 79.

the key decision-making is done by the EU's intergovernmental institutions. The Member State may be assessed and questioned, or interrogated, in the General Affairs Council only *after* the Council Presidency schedules a hearing.[86] Moreover, a recommendation or a final determination of a 'clear risk of a serious breach' may only be issued *after* a supermajority is attained in the Council. While the political consensus of over 22 Member States may increase the force and legitimacy of a determination condemning the activity in a particular State, its effectiveness hinges upon the very existence of such a political consensus. Thus, unless a "coalition of the willing" is found, neither a recommendation can be issued nor a determination under Article 7(1) found.

While similar, the RLF may therefore be distinguished by the fact that it allows for constant monitoring *without* the risk of losing a vote, as it is completely controlled by the Commission. This independence from interests of States is crucial,[87] and strengthens the RLF's utility as a monitoring tool, perhaps more effective at an early stage than the preventative arm of Article 7 itself as it does not face the same over and under-enforcement challenges. Thus, the additional dialogue and monitoring before the initiation of *either* of Article 7's arms is arguably 'not a "loss of time" but rather a necessary procedural stage before formalising any steps under Article 7 TEU.'[88]

Therefore, the RLF could be argued to represent a crucial supervisory and monitoring tool which ameliorated the shortcomings of Article 7 and helped with its activation. However, the statement that dialogue may be useful at an early stage, is not the same as saying that *only* dialogue should be resorted to; this is where the problem with the RLF's implementation materialises. The Commission's decision to engage in dialogue for almost two years contributed to the delay in the EU's escalation and activation of Article 7 thereby arguably

[86] Article 237 TFEU.

[87] The need for the EU to possess a tool that is 'independent from political influence' was recognised by the European Parliament back in 2013, perhaps indicating an acknowledgment of the deficiencies in the preventative arm of Article 7. See Parliament, 'Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))', P7_TA(2013)0315, para 81; Bieber and Maiani (n 25) 1085. For an assessment of the issues with Article 7's intergovernmentalism see Chapter 4, Section 3.3.

[88] Wilms (n 34) 79-80.

weakening the EU's capacity to enforce its values. It is to this problem, and the corresponding time-sensitivity of rule of law crises that we turn to next.

3.2 Time-sensitivity and the problem with in(sufficient)action

Rule of law crises are 'time-sensitive'.[89] The more time is given to the illiberal governments and the more the EU's institutions delay with addressing the crisis, the more time the recalcitrant States have to consolidate power and dismantle checks and balances, the more difficult it will be to prevent further damage or reverse the 'slide into autocracy'.[90] Pech and Scheppele describe this well:

> Once a government has created facts on the ground - packed courts, fired officials, purged institutions - the Commission's tools fail to work. The Commission can virtually never force a change in an existing situation but only lay out ground rules for the future. Poland's ruling party must have understood that it would not be possible for the Commission in Poland - as it was not possible for the Commission in Hungary - to reinstate fired judges (or dismiss unlawfully appointed ones), insist on new members of no-longer independent boards, restore civil society organisations closed by funding cuts or amplify the robustness of the opposition after state-sponsored bullying had scared people into leaving the country.[91]

In other words, if the EU is unable to exert sufficient pressure so as to stop backsliding before the regime consolidates its power, its enforcement capacity will be severely weakened. The decision by the Commission to engage in dialogue for two years, during which PiS pretended to engage in dialogue but continued to entrench itself in power, has therefore limited the effectiveness of the preventative arm of Article 7 before it was even used.[92]

Indeed, the ineffectiveness of Article 7's preventative arm is clear – the situation in Poland has continued to deteriorate irrespective of the mechanism's initiation. Of course, there are problems with how Article 7(1) TEU has been handled by the Council, with it failing to schedule regular hearings or issue recommendations or a warning, and we know that its

[89] Commission Communication (n 78) 9; Robert Grzeszczak and Stephen Terrett, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience' (2018) 69 NILQ 347, 355.
[90] Bugarič, 2018 (n 49) 83.
[91] Pech and Scheppele (n 32) 27-28.
[92] Grzeszczak and Terrett (n 89) 356.

enforcement capacity is also soft as it may only lead to 'mere criticism, not a move toward deadlines, ultimatums or sanctions.'[93] However, the tool still represented an escalation from the RLF and it is possible that had the mechanism been used effectively by the Council at an earlier stage, Poland could have been deterred from proceeding with its backsliding. The fact that Article 7's initiation was delayed, with the Polish government able to continuously and increasingly entrench itself in power, certainly did not help. PiS was convinced that the EU would not escalate to Article 7, and it therefore engaged in dialogue with the Commission while simultaneously ignoring its recommendations. By continuing dialogue, PiS made the most of the provision 'to delay the possible recourse to the parts of Article 7 TEU that bite.'[94]

Accordingly, it is argued that the problem is not with the initiation of the mechanism which was useful in itself as it supplemented the activation of Article 7 – the problem lies with the continued dialogue once it was clear that the RLF was not leading to any change (thereby failing its first objective) and after it become clear that Poland was openly violating the rule of law.[95] Kochenov, Pech and Scheppele were therefore right to argue that Article 7 should have been initiated in 'November 2016 before the all too predictable unconstitutional capture of the Polish [CT] which happened at the end of December 2016'.[96] The Commission itself acknowledged in its recommendations that by undermining judicial review the regime was preventing the legislation passed from being scrutinised and tested against the provisions of the Constitution – an important check on the government's power had been dismantled, which allowed for the introduction of further damaging legislation, and yet the Commission failed to escalate the EU's response. The Commission's decision to continue dialogue therefore possibly allowed 'the Polish ruling party… to undermine if not annihilate virtually all checks and balances one year before the Commission moved to act [under Article 7].'[97]

Knowing that delays in action (or inaction) undermine the EU's enforcement capacity by allowing further deterioration, we may consider how the EU could learn from this. In order to

[93] Pech and Scheppele (n 32) 30-31.
[94] Kochenov and Pech 2015 (n 20) 539.
[95] See Niklewicz (n 35) 287-288.
[96] Kochenov, Pech and Scheppele (n 17); Laurent Pech, 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?' <https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/> (*Verfassungsblog,* 31 October 2016) accessed 12 November 2020.
[97] Kochenov, Pech and Scheppele (n 17).

do this, we need to reflect upon the structure of the RLF. The Commission gave itself discretion over the escalation of the tool which, in turn led to the introduction of political considerations into the process.

3.2.1 Commission discretion as a challenge to efficacy

Before we proceed to outline the flaws with the construction of the RLF, we should also acknowledge that it did attempt to address the time-sensitive nature of rule of law crises. Indeed, as a soft law mechanism it was introduced relatively easily. The mechanism did not require time consuming Treaty amendments, the success of which could not be guaranteed.[98] The other option would be to create a mechanism via legislative means, but this likely would have required a majority in the European Parliament and a qualified majority in the Council. This too would have likely faced delay at a time when the EU's Member States were descending into authoritarianism and a prompt response was necessary.[99] Therefore, the ability to introduce a new mechanism relatively quickly is undoubtedly a strength of the RLF,[100] especially given the initial reluctance to activate Article 7 and the inability of the infringements procedure to resolve the crisis (which, it could be argued, rendered the EU powerless at the time).

Furthermore, as highlighted by Wilms, the RLF is time efficient in both a procedural and a substantive sense. Procedurally, the RLF's structured dialogue leads to the 'setting… [of] clear deadlines for replying to its [the Commission's] questions'.[101] Substantially, the RLF aims to find 'rapid solutions to the threats to the Rule of Law' by highlighting threats at an early stage. This may in turn allow 'the Member State concerned… [to] adapt or correct its contentious behaviour at an early stage'.[102] Indeed, the RLF was initiated against Poland almost as soon

[98] Kochenov and Pech 2015 (n 20) 528-529, 532.

[99] Indeed, the Council Legal Service did not approve of the RLF, and the Council instead created its Rule of Law Dialogue, a heavily deficient mechanism which relies on self-reporting by States. (Pech and Scheppele (n 32) 29; Council, 'Commission's Communication on a new EU Framework to Strengthen the Rule of Law' (Opinion of the Legal Service) Brussels, 27 May 2014, Doc 10296/14; Council, 'Press Release, 3362nd Council meeting, General Affairs', Brussels, 16 December 2014, Doc 16936/14) It is thus possible a similar reluctance could have been shown regarding the creation of a mechanism in the EU's legislature, thereby leading to more delay.

[100] Indeed, the Framework came into force approximately a year after the calls for a new mechanism became more widespread across the Union. See Bonelli (n 17) 189-190.

[101] Wilms (n 34) 79; Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM/2014/0158 final, 8.

[102] Wilms (ibid) 79.

as the CT became assaulted. Therefore, not only was the RLF able to be introduced with relative ease, but once in force, it was to address threats at an early stage, and without unnecessary delay. The RLF thus *prima facie* embodies an acknowledgment by the EU of the time-sensitive nature of rule of law crises.

However, despite some of its positive aspects, the mechanism's ability to respond to the time-sensitivity of rule of law crises is limited in *inter alia* two ways. First, it does not possess clear timeframes for the escalation between its different stages.[103] Namely, there was no automatic connection between the issuing of the recommendations (stage 2) and the follow-up (stage 3), as a result of which the Commission was able to issue repeated 'ad hoc' recommendations, unforeseen in the original Commission Communication.[104] Secondly, the activation of Article 7 was not a guarantee under the RLF, with the Commission Communication indicating that such escalation was merely a possibility. In turn, the RLF left a great deal of discretion over the implementation of the tool to the Commission. The point relevant for our purposes, is that this discretion – the lack of strict time-frames and the Commission's ability to decide *how* it would engage in follow-up to the non-implementation of its recommendations – allowed the Commission to continue its protracted discussions with Poland despite their ineffectiveness.[105] It introduced more political considerations into the process, with the Commission apparently believing it had to seek the approval of the Council before it resorted to the activation of Article 7(1). Such approaches, as rightly pointed out by Pech and Scheppele add 'a political element which may be considered ill-advised for an institution that is supposed to act independently and whose insulation from politics was institutionally organised to enable it to take "difficult" decisions in ensuring the uniform application of Union law.'[106]

Therefore, while some of the RLF's aspects represented an acknowledgment of the time-sensitive nature of rule of law backsliding, the lack of an automatic connection between the RLF and Article 7, instead leaving the decision over escalation to the Commission's discretion, allowed for the dialogue to last longer than was necessary. The Commission therefore

[103] Kochenov and Pech 2016 (n 24) 1070.
[104] Kochenov 2021 (n 20) 139-140.
[105] Kochenov and Pech 2016 (n 24) 1071; Kochenov and Pech 2015 (n 20) 533; Kochenov 2021 (n 20) 139; Lavelle (n 85) 43.
[106] Pech and Scheppele (n 32) 29.

continued operating under a tool of soft enforcement. Such tools, however, are to address threats at an early stage and once the breaches are obvious, there is little point in engaging in further preventative dialogue – once the damage is done, it can no longer be prevented from occurring.

4. Conclusion

The RLF represented an important contribution to the EU's anti-backsliding toolkit at a time when the activation of Article 7 appeared unfathomable.[107] The perception of Article 7 as nuclear and unusable was unfounded, but that does not change the fact that the EU's institutions did not see it as a viable tool. The RLF's ability to gather evidence and monitor the situation was therefore crucial in addressing concerns of over and under-enforcement associated with the activation of Article 7.[108] In that sense, the RLF appears to have achieved its secondary goal of escalating the EU's response to that of Article 7.

However, despite its positive contributions, the RLF was ineffective at resolving (halting or preventing) further deterioration – its first and primary objective. On the contrary, one could argue it further facilitated this deterioration through the Commission's protracted dialogue. Therefore, it is argued that the EU's experience with the RLF ought to have taught the EU (at least) two lessons.

First, if the EU wants to dissuade a state from acting in a particular way (or to enforce a particular value), it cannot rely on tools of soft enforcement if it is faced with recalcitrant states. These tools are effective when States are cooperative and willing to engage in a meaningful dialogue. However, when faced with 'bad faith' actors,[109] more deterrent tools are needed in order to increase the cost of non-compliance for those states. While these tools also have risks and issues associated with them, it would appear that a deterrence-based approach is more suitable as it does not rest on an unfounded (in the context of rule of law backsliding) presumption of compliance.

[107] On a positive, or hopeful assessment, prior to the tool's apparent ineffectiveness see von Bogdandy, Antpöhler, and Ioannidis (n 9) 228.
[108] Wilms (n 34) 82.
[109] Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 HJRL 1, 21.

Secondly, the EU's institutions must be pragmatic and respond appropriately when they see that their tools are ineffective. The EU will not be able to resolve the threat posed by rule of law backsliding if its approach is stagnant. The situation is constantly deteriorating, with the PiS government continuously consolidating and entrenching itself in power. By refusing to acknowledge such deterioration, and by failing to adequately respond, the EU's approach could be described as negligent at best, and permissive (and therefore facilitatory) at worst.[110] The longer the EU delays, the more challenging the reversal of these measures will become, and the more difficult it will be for the EU's tools in any form – soft or hard – to halt the decay.

[110] Kochenov 2017 (n 85) 1.

Chapter 4: Article 7's Ineffectiveness

1. Introduction

Despite the activation of Article 7's preventative arm, the situation in Poland has continued to deteriorate. It is therefore possible to argue, in line with the derogatory statement of Minister Czaputowicz, that the provision is 'dead':[1] hearings have been infrequent and deficient; no recommendations have been issued; and no conclusion to the procedure (which would culminate with an official warning of the EU) is in sight. Even the issuing of this warning is arguably too late now, given that the regime has already largely entrenched itself in power and the preventative arm does not possess adequate means to compel Poland to reverse its backsliding. Given the lack of resolve of the Member States in the Council to act under the preventative arm, it should therefore also be unsurprising that the main deterrent aspect of Article 7 – its sanctioning arm – has not been initiated and this is likely to remain so given its high procedural thresholds. Kochenov is therefore correct when he describes Article 7 as not only 'dead', but also 'misused'.[2]

In order to illustrate some lessons the EU could draw from this experience, this chapter will attribute Article 7's ineffectiveness to three aspects pertaining to its implementation and structure.

First, in considering the tool's implementation, the EU's failure to activate Article 7 will be considered. In order to illustrate that the EU's caution, inaction and delays weakened its enforcement capacity – and given the fact that the previous chapter has already explained the negative impact on the EU's preventative tools – the effect of delaying Article 7's initiation

[1] See Robert Grzeszczak and Stephen Terrett, 'The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience' (2018) 69 NILQ 347, 354. See also Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 HJRL 1, 18-21.

[2] The point made by Kochenov is that the mechanism has not been used effectively, as has been illustrated throughout this thesis. See Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) 140.

on its sanctioning arm will be considered. It will be argued that by delaying the activation of Article 7 the EU has neutered its strongest enforcement tool: with Poland joining Hungary in its backsliding the two States are likely to invoke their veto in the European Council if Article 7(2) is initiated.[3]

Secondly, the problematic design of Article 7 and its impact on the tool's efficacy will be considered. First, the section will illustrate why it may have been necessary for Article 7 to be qualified given that, if left unqualified, it would allow the EU to sanction a Member State for events occurring in a purely domestic capacity. It will then be argued that while some qualifications to a tool like Article 7 may have been called for, in practice two particular qualifications – one relating to the tool's high procedural thresholds and the other relating to its intergovernmental nature – have ultimately limited its effectiveness. Thus, secondly, it will be highlighted in the context of Article 7's high procedural thresholds that setting standards too difficult to satisfy renders the tool unusable. And thirdly, it will be argued that this problem is exacerbated by Article 7's intergovernmental decision-making under which even the preventative arm's lower threshold has thus far not been satisfied. It is therefore claimed that the larger issue relates to leaving the decision-making of a tool for the enforcement of the EU's values *solely* to the consideration of a body least likely to use it.

Article 7's ineffectiveness may therefore be attributed to three reasons: delays which weakened the tool's capacity to resolve backsliding before it was even initiated; high thresholds which have limited the tool's sanctioning capacity; and its intergovernmentalism which has made any decision taken under the mechanism a political one, thereby making it possible for considerations of diplomatic expediency to outweigh the need to respect the EU's founding values.

2. The failure to initiate the tool: a neutered deterrent

While the violations in Hungary began in 2010, and those in Poland in 2015, Article 7's initiating bodies were uninterested in using the EU's prime enforcement tool. Article 7 was

[3] In this thesis the issue associated with Article 7(2)'s unanimity requirement is treated as a separate issue pertaining to the tool's design. (See section 3.2) In discussing the delays associated with Article 7's implementation, however, the thesis aims to highlight the EU's inadequate treatment of rule of law backsliding in Poland.

only activated against Poland after the failure of the RLF, in December 2017, and it was activated against Hungary a year later in September 2018. Each initiating institution found an excuse not to use the mechanism. As highlighted by Kochenov:

> The Commission, instead of initiating Article 7 TEU, which it could do in the case of both Article 7(1) and 7(2) procedures designed and deployed… the [RLF]… the Council, instead of working with the other institutions on Article 7, promoted [an] annual rule of law dialogue, based on the idea of peer review and unanimously deemed by scholars as unworkable; the European Parliament, which could initiate Article 7(1) TEU prepared, instead, a detailed proposal on how to revamp the existing structure of guaranteeing the adherence to values. Select Member States, instead of initiating Article 7 TEU, as it takes 1/3 to launch Article 7(1) or 7(2), were busy writing letters to the Commission to ask it to do something: the requests, which ultimately resulted in the [RLF], instead of initiating Article 7 TEU.[4]

The reasons for refraining from initiating Article 7 are widely documented in the literature.[5] One such reason was Article 7's perception as a nuclear and unusable mechanism following the Haider Affair. Furthermore, there was no guarantee that the tool would be effective given its high procedural thresholds, the Council's complete discretion in decision-making which created issues of over and under enforcement, and the fact that even the tool's sanctioning arm was not guaranteed to stop backsliding. Pech and Scheppele also point out the issue with multiple initiating bodies, which meant that 'no institution [bore] the primary responsibility for starting the process'.[6]

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[4] Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) EUI Working Paper No LAW 2017/10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965087> accessed 24 August 2021, 11-12. (footnotes omitted)

[5] See, e.g., Gábor Halmai, 'How the EU Can and Should Cope with Illiberal Member States' (2018) 38(2) Quaderni Constituzionali 313, 327-328; Dimitry Kochenov and Laurent Pech, 'Better Late than Never: On the European Commission's Rule of Law Framework and Its First Activation' (2016) 54 J Common Mkt Stud 1062, 1070-1071; Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 90. See also Chapter 1, Section 2.2.

[6] Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3, 26.

Whatever the reason, the decision not to initiate Article 7 had significant consequences in weakening the EU's enforcement capacity.

First, as already discussed in the previous chapter, the decision to refrain from escalating the EU's response meant that it could not sufficiently challenge the deterioration in Poland, thereby rendering itself powerless.[7] With the PiS government able to further entrench itself in power, the EU's ability to resolve backsliding was continuously weakening.

Secondly, and more directly, such delays arguably neutered Article 7's sanctioning arm of its deterrent potential. Indeed, after the RLF's failure to prevent further backsliding in Poland, followed by the activation of Article 7(1) TEU by the Commission, Victor Orbán made a clear declaration that Hungary would veto any determination under Article 7(2) TEU against Poland.[8] Since, in order for sanctions to be imposed under Article 7(3) TEU, unanimity must first be attained and a denouncement issued by the European Council, the provision's applicability has been neutered. One can expect the Polish government to reciprocate, if Article 7(2) was to be initiated against Hungary.[9] Had the tool been initiated against Hungary between 2010 and 2015, with Hungary's voting rights being suspended under Article 7(3) TEU, the failure of the sanctioning arm would therefore not be guaranteed. Therefore, even if Article 7's sanctioning capacity was only to serve as a deterrent – never to be used – the fact that it has been rendered unusable deprives it of even this character.[10]

This claim suggests that Article 7 has lost its ability to dissuade deterioration and as a result has lost much of its enforcement capacity. It rests on the assumption that Article 7's sanctioning arm would be more capable of resolving rule of law crises than softer and more dialogic means of enforcement such as those found in the RLF or even the preventative arm

[7] Günter Wilms, 'Protecting fundamental values in the European Union through the rule of law: Articles 2 and 7 TEU from a legal, historical and comparative angle' (EUI 2017), 71.
[8] Reuters Staff, 'Hungary PM flags veto of any EU sanctions against Poland' (*Reuters*, 8 January 2016) <https://www.reuters.com/article/us-poland-hungary-sanctions-idUSKBN0UM0L220160108> accessed 24 August 2021; Kim Lane Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (*Verfassungsblog*, 24 October 2016) <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> accessed 24 August 2021.
[9] James Shotter and Valerie Hopkins, 'Poland pledges to veto sanctions against Hungary' (*FT*, 12 September 2018) <https://www.ft.com/content/b743c0b2-b6cd-11e8-bbc3-ccd7de085ffe> accessed 24 August 2021.
[10] See Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) 22 Trinity CL Rev 35, 43.

of Article 7. This may appear to some as an inappropriate assumption given the fact that even sanctioning tools are not guaranteed to induce change.[11] Indeed, Article 7's sanctioning arm is incapable of forcing legislative change on the ground. The tool rests on the 'hope' that the pressure exerted through sanctions will be sufficient to encourage a Member State to cease its violations.[12] However, it is argued that hope regarding the impact sanctions may have is different to the hope that the violating State will resolve its violations through dialogue (and little to no pressure). In other words, the hope that hard enforcement will be effective is not the same as the assumption of compliance upon which tools of soft enforcement are based, as discussed in the previous chapter. While compliance with the EU's requests is ultimately voluntary, what distinguishes tools of hard enforcement from those of soft enforcement is the cost associated with non-compliance. Given that backsliding states are uncooperative and set on eroding checks on their power, tools which are incapable of substantially raising the cost of non-compliance are less likely to be effective. Soft tools simply do not have that capacity. As correctly foreseen by Niklewicz, Poland's non-compliance with the EU's requests (and thus the ineffectiveness of the EU's approach) stemmed from Poland's belief that 'any collateral damage would be limited to naming and shaming, something with which it could live'.[13]

Therefore, by delaying and therefore rendering the sanctioning arm unusable, the EU has been left only with the preventative arm in the context of Article 7 which significantly weakens its enforcement capacity.

The lesson to draw from this experience may therefore be similar to that articulated at the end of the previous chapter. While bold actions may not always be well-advised,[14] the time-sensitive nature of rule of law crises requires such a response. Poland's deterioration illustrates how the initial dismantlement of checks and balances by replacing judges with government supporters may then turn into a direct challenge to EU law and its functioning.[15] A *prima facie* internal matter is manifesting very real and very external effects which are

[11] Kochenov (n 2) 136. See also Chapter 3, Section 2.3.1.
[12] Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141, 144.
[13] Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' (2017) 16 EurView 281, 285.
[14] Wilms (n 7) 71.
[15] See Chapter 2, Section 3.2.

damaging to the EU. We may not be able to turn back time and convince the EU to have initiated Article 7 sooner, but if anything, it ought to have realised by now that further delays will allow for further damage. Irrespective of the risks associated with harsh actions, it is possible to argue that – at least in the context of rule of law backsliding states – the damage caused by inaction outweighs the concerns associated with action.

3. Article 7's qualifications

In theory, Article 7 is a powerful tool. It possesses not only extensive sanctioning powers, combined with the ability to exert political pressure by condemning a Member State as a violator of the EU's values, but its assessments are also applicable to purely internal and domestic affairs. While neither sanctions nor political pressure are guaranteed to be effective in dissuading backsliding, the tool still arguably represents the broadest and most extensive deterrence tool in the EU's enforcement toolkit. Grzeszczak and Terrett are therefore correct when they state that 'Article 7 TEU appears to create a powerful weapon to be wielded against any Member State which threatens to depart from the EU's values.'[16]

However, this statement must immediately be qualified – the tool has the capacity to be powerful, but the limitations imposed on it strictly curtail its efficacy, viz., its capacity to enforce the EU's values.[17] The two central limitations for the purposes of this section are Article 7's 'excessively demanding' procedural thresholds,[18] and its intergovernmental nature.[19] The former refers to the introduction of procedural qualifications which preclude the tool from being used too frequently or easily. The latter qualification refers to a system whereby the operative decision-making is carried out by institutions composed solely of States, be it heads of state or representatives of the states' governments. Such tools are also oftentimes deprived of judicial review, with decision-making left solely to the discretion of political bodies.

[16] Grzeszczak and Terrett (n 1) 353.
[17] Liesbet Hooghe and Gary Marks, 'Grand theories of European integration in the twenty-first century' (2019) 26(8) JEPP 1113, 1125.
[18] Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 224.
[19] Lavelle (n 10) 40.

Accordingly, the purpose of this section is to illustrate why the inclusion of these aspects into tools tasked with the enforcement of the EU's values limits their effectiveness.

First, it will be highlighted why Article 7 TEU had to be qualified. This assessment will illustrate that tools capable of limiting State sovereignty through the imposition of broad sanctions on purely domestic affairs are very unlikely to be agreed upon by states, and in any case such tools may also possibly be incompatible with the EU's foundations in sincere cooperation. Accordingly, in criticising Article 7's high thresholds and intergovernmentalism it must be acknowledged that despite their inclusion having a negative impact on the efficacy of values enforcement, the existence of a completely unrestricted broad sanctioning tool is unlikely.

Secondly, in assessing Article 7's high thresholds, it will be illustrated that while a desire to make a powerful sanctioning tool difficult to apply is somewhat justified, if a wrong balance is struck between accessibility (ease of use) and non-accessibility (impossibility of use), the tool risks being redundant.

Thirdly, the intergovernmental issue with Article 7 will be discussed. Since Article 7 vests its operative decision-making in the EU's Member States, over relatively vague criteria, with no accountability mechanism over the substantive acts (or lack thereof), the tool's effectiveness becomes dependent on the will of states to act. This is problematic for two reasons. First, states engage in considerations of diplomatic expediency which may discourage them from criticising other states. Secondly, utilising Article 7 and imposing harsh sanctions could undermine the financial interests and the commitment to the internal market of Member States. Given these considerations, States are unlikely to sanction or even condemn one another. Thus, leaving the enforcement of the EU's values to, arguably, its least value-oriented institutions limited the efficacy of the mechanism from the outset.

3.1 The need to restrict Article 7

States are reluctant to relinquish their sovereignty. Accordingly, construing any form of sanctioning mechanism which can limit sovereignty by imposing sanctions for purely domestic matters is very unlikely.[20] Closa, after conducting a survey of various international

[20] See Carlos Closa, 'Securing Compliance with Democracy Requirements in Regional Organizations', in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 381.

organisations and their sanctioning and suspensory capacity for deviations from democracy, concluded that such suspensory clauses are made 'possible because of the adoption of mechanisms which do not relinquish national government control over the implementation of these provisions.'[21] He noted a pattern in all international organisations which contained such clauses. *Inter alia*, such suspensory clauses were 'in all cases… political' and therefore lacked any form of substantive judicial review.[22] The decision-making was 'intergovernmental in all cases',[23] and '[a]lmost all international organizations and regional organizations apply either consensus or unanimity' thereby possessing high procedural thresholds.[24]

Given that no other international or regional institution possesses such broad suspensory or sanctioning clauses which are not intergovernmental, or which do not possess high procedural thresholds, one could plausibly conclude that States are unwilling to agree to less demanding and easier to utilise alternatives. It is therefore possible to argue that States, as masters of the treaties, would only allow for the creation of a sanctioning or suspensory mechanism (relating to broad political concepts such as democracy or the rule of law) *if* they could remain in control of it, so as to protect their sovereignty.[25]

Indeed, by ensuring decision-making is vested with them, and not with supranational bodies, States limit the capacity of the organisation to dictate how they govern themselves. Furthermore, by setting high procedural thresholds, States can ensure that such sanctioning tools may not be used for ideological or partisan purposes by other governments. Such procedural thresholds therefore also create a form of checks and balances, by ensuring the tool is not overused.

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[21] ibid 400.
[22] ibid 391.
[23] ibid 389-390.
[24] ibid 391.
[25] ibid 400; Hooghe and Marks (n 17) 1125; Carlos Closa and Gisela Hernández, 'Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU' (*RECONNECT*, 25 May 2020) <https://reconnect-europe.eu/blog/institutional-logics-and-the-eus-limited-sanctioning-capacity-under-article-7-teu/> accessed 24 August 2021. We may also look to the negotiations concerning the recently introduced conditionality mechanism which, after the Council's input, not only limited the tool's scope, but also ensured that operative decision-making would remain with the Council by ensuring that reverse qualified majority voting was not adopted. See Niels Kirst, 'Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) 6(1) European Papers, Insight 101, 105-106.

One could also argue that, from an EU perspective, limiting such tools is not completely unfounded. Indeed, the EU is based on an adherence to the duty of sincere cooperation. Consequently, the EU expects that its constituent entities – both its institutions and its Member States – will strive to help the EU achieve its goals and will not take any actions which would hinder them.[26] Ensuring the protection of Article 2 TEU values – the core values upon which the EU is based – arguably reflects such a goal. Consequently, bestowing decision-making with States (or intergovernmental institutions) could be seen as justifiable given that they themselves have a responsibility to protect the EU's goals and values.[27] There is therefore, in theory, no problem in vesting decision-making over a values enforcement tool in intergovernmental bodies as they are assumed to protect them. Furthermore, on this account high thresholds on such tools could also be warranted: given the belief that the European Council, and the Member States within it, are committed to securing the EU's goals, there is no need to worry about not reaching the unanimity threshold (or supermajority, in the context of the preventative arm) when the situation is dire. After all, Article 7 was meant to be a 'last-resort provision'.[28] Therefore, one could argue that an *unrestrained* tool for enforcing the EU's goals or values would push the boundaries of what the EU is and therefore represent an improper overreach of its competences.[29]

Therefore, at least theoretically, Article 7's qualifications may appear justified. From the perspective of States allowing a supranational institution to possess an unqualified

[26] Article 4(2) TEU; Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1061. (footnotes omitted). See also Leonard Besselink, 'The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in Jakab and Kochenov (n 20) 144; Panos Koutrakos, 'Institutional Balance and Sincere Cooperation in treaty-making under EU law' (2019) 68(1) ICLQ 1, 6; Peter Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019).

[27] See Commission, 'Strengthening the rule of law within the Union: A blueprint for action' (Communication) COM/2019/343 final, 3, 16. See also Armin von Bogdandy, 'Fundamentals on Defending European Values' (*Verfassungsblog*, 12 November 2019) <https://verfassungsblog.de/fundamentals-on-defending-european-values/> accessed 24 August 2021.

[28] Commission, 'Respect for and promotion of the values on which the Union is based' (Communication) COM/2003/606 final, 7.

[29] See Armin von Bogdandy, 'Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States' (2020) 57(3) CML Rev 705, 732; Bugarič (n 5) 86. cf Sadurski (n 18) 223.

sanctioning tool would not be acceptable given the possible infringement of sovereignty. From the EU's perspective, such a tool would arguably undermine the EU's commitment and foundation in sincere cooperation.

It is therefore possible to argue that Article 7 had to be restricted with high thresholds and intergovernmental decision-making in order to reflect these two concerns. However, this becomes problematic when the EU's actors – supposedly committed to the EU's goals – do not uphold their responsibilities. For instance, when the Member States tasked with enforcing the EU's values – under its main enforcement tool – appear apathetic and uncommitted to the protection of these values (or indeed openly violate them). In such a case, the high procedural thresholds become a burden preventing the few states committed to the protection of those values from enforcing them, and intergovernmental decision-making becomes a challenge to the tool's very efficacy. Therefore, an issue arises between the need to qualify a tool such as Article 7 (in order to have it exist in the first place) and the need to make it workable (for efficacy reasons).

3.2 High procedural thresholds

The first limitation we will discuss is that of high procedural thresholds – the issues associated with it are somewhat self-explanatory and therefore for simplicity's sake we may begin here.

Given the unanimity requirement stipulated in Article 7(2) TEU, Article 7's sanctioning arm *prima facie* cannot be utilised – and is rendered ineffective – as Poland and Hungary are willing to protect each other with a veto.[30] It is perhaps for this reason that the sanctioning arm of Article 7 has not been initiated. As illustrated in the previous chapter, the high thresholds associated with activating either of Article 7's mechanisms (indeed the four-fifths majority under the preventative arm is also a relatively high threshold to attain) entail a series of risks with over and under enforcement. Arguably these risks are far higher in the context of the sanction arm, the success of which is even less likely given the Poland-Hungary veto pact. Indeed, such a failure would provide an unprecedented boost to the violating regime. Recall that Minister Czaputowicz described Article 7 as a 'dead' provision given the insubstantial pressure exerted on Poland following the initiation of the tool's preventative arm. Extending this logic further, if the sanctioning arm – relating to an actual violation of the

[30] Pech and Scheppele (n 6) 12-13.

EU's values, and not its mere risk – failed, the backsliding States could use this as unequivocal proof that all of its critics were wrong, that it was not violating the rule of law, and that any such criticisms are merely political and ideological.[31] The failure of the sanctioning arm would likely bolster the regime's support amongst its supporters by highlighting that they were right, and they were merely being discriminated against. It would also likely render Article 7 unusable again, perhaps ushering in a new 'nuclear' perception with a modern-day Haider Affair equivalent. The failure of the sanctioning arm could therefore have the opposite effect to that desired and end the EU's ability to address backsliding among its Member States. There is therefore merit in arguments which advise caution and encourage the EU not to 'pursue one recalcitrant Member State when it is known that there are more than one and unanimity is required'.[32]

Therefore, with two violators, this exceptionally high threshold may have rendered the tool unusable and accordingly limited the EU's capacity to sanction and deter violations of its values.[33] In order to obviate this challenge, some have proposed and justified the initiation of Article 7(2) TEU against Hungary *and* Poland, simultaneously.[34] Kochenov presents this argument very clearly. By looking at the provisions of Article 354 TFEU 'which lays down the rules of the procedural aspects of Art. 7 TEU', he argued that:

> although Art. 354 TFEU refers to a concrete Member State which is to be excluded from voting in such cases, the wording clearly implies that in the cases where several Member States are suspected of failing to adhere to EU values all such Member States should not be given a chance to derail the application of Art. 7 TEU. Should the contrary be the case, all the procedural requirements of Art. 7 TEU, especially those requiring unanimity, would end up being deprived of their intended *effet utile*, given that the backsliding Member States would most likely obstruct the application of

[31] See Wilms (n 7) 68; Chapter 3 section 3.1.

[32] Dimitry Kochenov, 'The Commission vs Poland: The Sovereign State Is Winning 1-0' (*Verfassungsblog*, 25 January 2016) <https://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/> accessed 24 August 2021; Wilms (n 7) 80.

[33] Grzeszczak and Terrett (n 1) 353.

[34] Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*Verfassungsblog*, 23 December 2017) <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> accessed 24 August 2021; Pech and Scheppele (n 6) 29, 35.

> sanctions to each other's cases. Excluding several Member States from voting can thus be deemed as implicitly authorised by Art. 354 TFEU in the context of Art. 7, especially in the context of the Art. 7(2) TEU procedure. It will be up to the Court, when approached by one such Member State under Art. 269 TFEU, to clarify the exact extent of such an exclusion.[35]

Kochenov therefore highlights how the CJEU could exclude States which are violating the EU's values – perhaps illustrated by the fact that the Article 7(1) procedure has been initiated against them – from having a vote in the context of Article 7(2) TEU, such as by having an Article 7(2) determination against those states simultaneously.[36] This is a convincing argument given the Court's capacity to review procedural aspects of Article 7,[37] and the progressive and teleological interpretations seen in its recent jurisprudence. In *ASJP* the Court broadly interpreted a somewhat procedural provision in Article 19(1) TEU which requires that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed', turning it into a substantive provision which required that domestic courts tasked with implementing EU law must be independent and impartial in order to ensure effective application of EU law, thereby attempting to protect the rule of law in the EU.[38] In the Białowieża case the CJEU broadened its oversight and enforcement powers under Article 279 TFEU, and the Court has since then issued other decisions targeting the illegality of the measures which undermine the rule of law in Poland.[39] The Court is therefore *prima facie* willing to interpret the treaties in a teleological manner and that is why – given the threat posed to the EU's very functioning through rule of law backsliding – it would not be surprising to see the Court allow for the activation of Article 7(2) TEU against *both* Hungary and Poland,

[35] Kochenov (n 2) 143.
[36] ibid.
[37] See Article 269 TFEU; Matteo Bonelli, 'A Union of Values: Safeguarding Democracy, the Rule of Law and Human Rights in the EU Member States' (PhD thesis, Maastricht University 2019) 177, 180-181.
[38] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, paras 32-37.
[39] See, e.g., Case C-441/17R *Commission v Poland (Białowieża Forest)* EU:C:2017:877, paras 99-100; Case C-791/19 *Commission v Poland (disciplinary regime for judges)* EU:C:2021:596, paras 50-52. See also, Kim Lane Scheppele, Dimitry Kochenov, and Barbara Grabowska-Moroz, 'EU Values are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 YB Eur L 3.

rendering the sanctioning arm of the tool usable again. Such an approach would certainly strengthen the efficacy of Article 7's sanctioning arm.

However, while this argument has merit, it is argued that the sanctioning arm is still highly unlikely to be used. Indeed, for the CJEU to be able to engage in such an assessment, the Article 7(2) initiating institutions would have to take an incredible risk and actually initiate this provision. Given the conservative and restrained approach of the EU, which has until now delayed, dialogued and attempted to weigh all of its options before attempting to act, this is unlikely.[40] This refusal to act would also be somewhat justified given that the EU's Member States are simply not as committed to the protection of its values, as illustrated through the Article 7(1) hearings in which an insufficient number of Member States have shown concern with the backsliding.[41] Given the risks associated with an Article 7(2) determination failing, the refusal to initiate the provision may be advised, as *even* if the CJEU decided to revoke the 'fellow-traveller veto' possibility,[42] there still appear to be other States not sufficiently committed to enforcing the EU's values. Finally, there are those who believe the abolition of the 'fellow-traveller veto' is impossible considering the current phrasing of the Treaties. Bonelli, for example, opposes such a teleological interpretation given that 'the Treaties explicitly regulate… in a restrictive manner, instances in which a Member State is barred from voting in the (European) Council and the activation of Article 7(1) TEU is not one of them.'[43] Consequently, while the argument is convincing, there are many other hurdles which preclude it from rendering the sanctioning arm effective, and therefore even a 25 Member State majority (27 Member States minus Poland and Hungary) would appear too high – and too dangerous – a threshold to attain.

The sanctioning arm is therefore ineffective as a deterrent.[44] Poland appears convinced as to the lack of unanimity in the European Council and the impossibility of using the Article 7(2) procedure against itself and Hungary simultaneously, which is why it has not been deterred from continuing its backsliding.[45] With sanctioning out of the picture, the only option left to

[40] See Pech and Scheppele (n 6) 29.
[41] See section 3.3 in this chapter.
[42] This term was used by Scheppele (n 8).
[43] Bonelli (n 37) 185, 392.
[44] Niklewicz (n 13) 285.
[45] ibid.

the EU under Article 7 is to continue its preventative arm, 'which is merely a symbolic gesture if the possibility of Article 7(2) and thus sanctions is precluded.'[46]

The lesson from this experience could therefore be that the EU ought to ensure its tools are accessible, even if they must be qualified. At present the balance between accessibility and non-accessibility appears heavily skewed in the other direction. Indeed, given the existence of multiple violators the unanimity requirement renders Article 7's sanctioning arm redundant. To resolve this issue, Bonelli argues that Article 7 would be rendered more operable if the procedural thresholds in Article 7(1) and 7(2) were aligned. Importantly, such a move, would not 'fundamentally [modify] its rationale' as the tool would still maintain high thresholds (and thus be qualified) and the operative decision-making would remain in the hands of the Member States.[47] While this appears a more appropriate threshold, given that 'many other international organizations… already provide for majorities lower than that of the EU in democracy-protecting provisions',[48] it is argued that a lowering of such a threshold would also have to be accompanied by sharing the responsibilities and powers between the EU's institutions more equally. Indeed, the four-fifths supermajority required for the conclusion of the preventative arm still seems unattainable, as illustrated by the fact that only 11 Member States illustrated their concern with the developments in Poland in the latest Article 7(1) hearing. While the mere decision to not ask questions is not necessarily indicative of how those Member States would vote in the context of a potential Article 7(1) decision, it arguably casts doubt over their commitment to policing the EU's values. Therefore, the concern over high thresholds is exacerbated when decision-making is left to apathetic institutions. As will be apparent in the following section, the EU's intergovernmental bodies appear to be such apathetic actors.

3.3 The intergovernmental qualification

Article 7 vests most of its operative decision-making with intergovernmental institutions.[49] It is the Council that decides under Article 7(1) if hearings should be scheduled, if recommendations should be issued, or if the procedure should be concluded and a warning

[46] Lavelle (n 10) 44.
[47] Bonelli (n 37) 392. See also Bugarič (n 5) 91.
[48] Bonelli (n 37) 392.
[49] See ibid 187.

issued. It is the European Council that decides if a determination under Article 7(2) is made. And it is the Council that imposes sanctions under Article 7(3). While other institutions may initiate Article's 7(1) and 7(2), and while the Parliament may refuse to give its consent thereby vetoing Article's 7(1) and 7(2), the tool cannot work if the intergovernmental bodies do not satisfy the supermajority, unanimity, or qualified majority votes under Article 7. Furthermore, Article 7 possesses no substantive judicial review, meaning that the CJEU's jurisdiction is confined to the 'procedural stipulations contained in that Article.'[50] In turn, there is no accountability mechanism which could compel the Council to act. It may not, for instance, be brought before the CJEU for its failure to act under Article 265 TFEU.[51] In other words, the CJEU may not police the failure of any institutions to initiate Article 7 TEU, or to assess the legality of any action (or inaction) under it.[52] Accordingly, outside of the scrutiny which each Member States' government may face before its respective national parliament, there is no way to legally oblige the Council (or its Member States) to enforce the EU's values under Article 7 TEU.[53] Therefore, the operative decision-making – over relatively broad substantive criteria[54] – is left to the complete discretion of the Member States in the two Councils.

Proponents of such intergovernmental enforcement argue that it increases the legitimacy[55] and efficacy[56] of the mechanism.

From a legitimacy perspective, political pressure arising from Article 7(1) declarations or recommendations, the Article 7(2) denouncement or sanctions following Article 7(3), may be perceived as more legitimate when they manifest through a consensus of the EU's Member

[50] Article 269 TFEU; Lavelle (n 10) 41; Besselink (n 26) 132-133.
[51] Case T-337/03 Bertelli Galvez v Commission EU:T:2004:106, [2004] ECRII-1041, para 15. See also Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 EuConst 8, 8-9; Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 EuConst 512, 516-517. cf Kochenov (n 2) 137.
[52] Article 265 TFEU itself requires the institution against which the claim is brought to have 'first been called upon to act'. (See, Case T-350/20 *Wagenknecht v Commission* EU:T:2020:635, para 32) Given the complete discretion over decision-making given to the Council and the European Council under Article 7, they arguably do not have a legal obligation to act. It is argued they have a responsibility to act given that they are the main decision-makers under the procedure, but this in itself is not the same as a legal obligation to act. Accordingly, the inaction of the EU's intergovernmental bodies cannot be assessed under Article 265 TFEU.
[53] Thank you to Dr Irene Wieczorek for her insight in this context.
[54] Bieber and Maiani (n 26) 1083.
[55] Lavelle (n 10) 41-42.
[56] Bugarič (n 5) 97.

States,[57] as opposed to its more supranational bodies such as the Commission or the CJEU. This is so because Article 7 is meant to address the most serious violations which are often a result of coordinated legislative change at the domestic level aimed at dismantling domestic checks and balances. In turn, these changes will most likely have been achieved by democratically elected governments commanding the support of their electorate – it could be questionable for the EU (and in particular institutions lacking 'accountab[ility] before directly elected bodies'),[58] which some argue itself suffers from a democratic deficit,[59] to undermine these governments.[60] Such crises are therefore termed as 'political', and to be remedied one may argue that they need to be addressed via political instruments.[61]

From an efficacy perspective, some argue that the need to attain a degree of consensus for the conclusion of any of Article 7's mechanisms is a strength of the tool.[62] Such an approach is less prone to criticism of partisan and political actions[63] given that such intergovernmental institutions will be composed of governments possessing different ideological backgrounds – such a diverse political consensus (while difficult to achieve) could be difficult to ignore,[64] thereby enhancing the effectiveness of the recommendations, declarations, or sanctions issued through Article 7's mechanisms.

However, while it is possible to argue that Article 7's efficacy and legitimacy are strengthened by placing it in the hands of Member States, this assumption is certainly not irrefutable. For instance, the fact that institutions which represent the Member States possess both judicial powers to determine the violation, and executive powers to impose sanctions for such a violation, with no recourse to judicial review of either decision, could undermine the

[57] ibid 91, 98.
[58] Besselink (n 26) 143.
[59] See Joseph HH Weiler, 'In the Face of Crisis - Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2013) 1 Peking U Transnat'l L Rev 292. cf Müller (n 12) 144, 146.
[60] Lavelle (n 10) 42; von Bogdandy (n 29) 738.
[61] See Sadurski (n 18) 201; Müller (n 12) 148.
[62] Bugarič (n 5) 91, 98. Hofer makes a similar point in the context of general imposition of sanctions in international law. See Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 AJIL Unbound 163, 166.
[63] A criticism often cited by Poland and Hungary. See Lavelle (n 10) 42.
[64] Bugarič makes this point in the context of financial sanctions, but this is believed to apply to the entirety of Article 7. See Bugarič (n 5) 98.

legitimacy of the measures adopted under Article 7.[65] More important for our purposes, however, is the point relating to efficacy.

It is argued that – irrespective of any benefits associated with intergovernmental enforcement – Article 7's implementation illustrates that this type of decision-making limits the efficacy of the EU's values enforcement capacity. This is so for two reasons. First, States are reluctant to criticise each other due to the possible political or diplomatic repercussions which may follow. Secondly, the inevitable confrontation between states under Article 7 contradicts the very logic of the internal market which arguably drives the decision-making of states. Accordingly, the hitherto failure to adequately use the preventative arm of Article 7 – such as by exerting sufficient scrutiny and pressure via hearings or issuing recommendations – should be unsurprising given that the tool's very effectiveness hinges on the will of Member States to act.

Simply put, the ineffectiveness of Article 7 is accentuated when the political institutions tasked with its enforcement are unwilling to act.

3.3.1 Diplomatic expediency as an excuse for inaction

With the Member States in the two councils possessing complete discretion over when and how to act under Article 7, the decision-making under either the preventative or the sanctioning arm becomes dependent on political and diplomatic considerations.[66] Pech, Wachowiec and Mazur present an apt example for our purposes. In criticising the Council's failure to schedule hearings, they highlighted how the otherwise active Finish Presidency in the Council failed to schedule a single hearing against Poland in 2019, while managing to schedule a hearing against Hungary. The authors attribute this to the Presidency's overlap with Polish Parliamentary elections: scheduling hearings or scrutinising Poland's rule of law violations may have influenced the outcome of the elections and so the constant deterioration in Poland was left unaddressed under Article 7.[67] Grzeszczak and Terrett present an equally applicable example, even if slightly dated.[68] In 2018 they acknowledged that any trade deal which would be reached between the UK and the EU would require unanimity in

[65] Lavelle (n 10) 42; Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: what it is, what has been done, what can be done' (2014) 51(1) CML Rev 59, 60.
[66] See Bieber and Maiani (n 26) 1083; Grzeszczak and Terrett (n 1) 355.
[67] Pech, Wachowiec and Mazur (n 1) 20.
[68] Grzeszczak and Terrett (n 1) 355. See also Lavelle (n 10) 44.

the European Council. Accordingly, they argued that the UK would be disincentivised to put pressure on Poland or Hungary, in an attempt to protect the rule of law, owing to the threat this could have posed to any future trade agreement. As the authors predicted, the UK failed to illustrate concern with the rule of law crisis during the Article 7(1) hearings.[69] The failure to unequivocally uphold the EU's values may be attributed to a variety of considerations – the UK may have, for instance, not wanted to interfere in the affairs of another State given its intention to leave the EU. However, regardless of the reason, the intention here is to emphasise that the complete discretion left to these intergovernmental institutions makes it possible for political and diplomatic concerns to outweigh the responsibilities these Member States have under Article 7 TEU.[70]

Sadurski may therefore have been right when he argued that the EU is 'a community that avoids harsh language and sanctions directed at its own members.' He highlighted that '[v]oting against a fellow member state (and note that every Article 7 pathway envisages, at a certain point, votes by other member states in the Council) is politically costly and may easily be portrayed as a case of hostility towards the nation concerned, rather than vis-à-vis the government of the breaching state.'[71] Member States must therefore consider whether their interferences and denouncements could be contrary to their interests and could therefore render the protection of the EU's values a subsidiary consideration. Because of such diplomatic considerations, States do not often criticise each other, leading to a 'habit of mutual indulgence', already evident in States' unwillingness to sue each other via Article 259 TFEU.[72] Therefore, by vesting sole decision-making in themselves, the EU's Member States effectively limited the effectiveness of Article 7, as it is a mechanism which hinges directly on their will to openly and publicly condemn (and possibly sanction) another Member State.

[69] See Laurent Pech, 'From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date' (*Verfassungsblog*, 13 November 2019) <https://verfassungsblog.de/from-nuclear-option-to-damp-squib/> accessed 24 August 2021.
[70] See Grzeszczak and Terrett (n 1) 355.
[71] See Sadurski (n 18) 223.
[72] Armin von Bogdandy and others, 'Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom' (*UK Constitutional Law Association*, 18 February 2012) <https://ukconstitutionallaw.org/2012/02/18/a-rescue-package-for-eu-fundamental-rights/> accessed 23 August 2021; Bugarič (n 5) 84.

3.3.2 Article 7's incompatibility with the logic of the internal market

Kochenov posits another reason as to why States may not be inclined to resort to Article 7, and attributes this to the EU's commitment to the internal market.[73] While his argument may not be determinative, it nonetheless helps draw attention to the problem with intergovernmental enforcement of the EU's values. The argument can be explained as follows.

The internal market was created *inter alia* 'to socialise and intertwine the Member States' economies to ensure a lasting peace and common prosperity'.[74] The initial thinking was that such a process would then lead to a greater political integration as States would become more inter-dependent;[75] that they would prefer to cooperate in order to continue with a process of further integration which would lead to greater economic prosperity.[76] Accordingly, the internal market's '*very logic*' – as Kochenov puts it – was predicated on the desire to render any need for animosity between States unnecessary, or even 'impossible'.[77]

If this argument were true, and Member States bought into this idea, the assumption that these States would then risk their economic growth in the name of some legal or political principles is relatively slim.[78] Indeed, attempting to enforce the rule of law in Poland via Article 7's sanctioning arm would likely require 'stinging measures.'[79] However, such financial sanctions could heavily undermine the operation of businesses from other EU states, in Poland.[80] Accordingly, even if an imposition of sanctions under Article 7(3) TEU would not suspend the operation of the internal market itself, utilising the mechanism would likely create tension between States, and it could also create unwanted economic loss on the part of the EU's Member States. As such, the stability and prosperity cultivated through the

[73] Kochenov (n 2) 130-132. See also Bugarič (n 5) 100-101.
[74] Kochenov (n 2) 132.
[75] ibid 131; Bugarič (n 5) 86.
[76] Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012) 3.
[77] Kochenov (n 2) 130. (emphasis added)
[78] See Bojan Bugarič, 'The Right to Democracy in a Populist Era' (2018) 112 AJIL Unbound 79, 82; Erin K Jenne and Cas Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?' (2012) 23(3) J Dem 147.
[79] Kochenov (n 2) 132, 145.
[80] ibid.

internal market would be put at risk through an inherently adversarial mechanism which pits States against each other over sensitive political matters.[81]

Simply put, resorting to such an adversarial mechanism would be counterintuitive to any institution driven by the logic of the internal market.[82] It would put at risk the desired stability by resorting to adversarial mechanisms, and possibly limit economic growth for States other than the one being sanctioned. The reluctance to resort to Article 7 is exacerbated by the fact that such sanctions need not be effective – Poland could try to ignore the sanctions and continue its backsliding as before – meaning that losses incurred by resorting to Article 7(3) TEU may not lead to the intended result. Therefore, as Kochenov puts it, 'expecting too much of the Council – and, by extension, of Art. 7 TEU – would be naïve. Unless something truly terrible happens in a backsliding Member State, the Internal Market, after all, functions as designed.'[83]

However, in response one could argue that the functioning of the internal market – and the financial rewards associated therewith – is also put at risk by rule of law backsliding.[84] Indeed, backsliding threatens the very foundations of the EU's legal system. As AG Bobek has put it:

> In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.[85]

[81] ibid 131.
[82] ibid.
[83] ibid. (footnotes omitted)
[84] See Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)' (*Verfassungsblog*, 17 January 2019) <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/> accessed 24 August 2021.
[85] Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and others* EU:C:2021:403, Opinion of AG Bobek, para 138.

Therefore, a judiciary which is not independent is less likely (if not unable) to ensure compliance with EU law – that much we can see from PiS's manipulation of the CT. In turn, if EU law is not complied with, this undermines the EU's ability to legislate; it undermines the existence and functioning of the EU's legal system.[86] Lacking a legal system, the EU would be incapable of continuing the process of integration, of harmonisation of laws to ensure efficient trade. Simply put 'for an internal market, an area of freedom, security and justice, a common fisheries policy, and so on, to exist at all, the assumption of compliance must be sustainable.'[87]

Accordingly, if Member States were driven by their commitment to the internal market, they would be expected to have utilised Article 7 by now, if only to protect its functioning. The fact that they have not done so may therefore undermine the argument that the failure to utilise Article 7 by the EU's intergovernmental institutions is attributable to their commitment to the internal market. Nonetheless, the point being made here is not to prove whether States are driven by the logic of the internal market, but to once again illustrate the various considerations which may render the protection of the EU's values a subsidiary concern to its intergovernmental institutions. Ultimately, Article 7 has not been utilised. Whether this is because States are driven by the logic of the internal market, or whether they have other political considerations which they prioritise above the functioning and integrity of the EU, or for any other reason – the point is that enforcing and protecting the EU's values does not seem to be a goal or a priority of the EU's intergovernmental institutions.

In sum, the intergovernmental challenge aims to bring attention to value-apathy which is likely to affect decision-making left to the complete discretion of Member States. Kochenov highlights that the Haider Affair teaches us that 'ironically… the EU does not need any law or a formal legal basis if the political will is in place to act'.[88] The problem with Article 7 may therefore be attributed to the 'absence of the political will to use it'.[89] Member States have various interests external to the functioning of the EU. Allowing for such political considerations in a procedure which is tasked with protecting matters of fundamental

[86] Bieber and Maiani (n 26) 1057-1058.
[87] ibid.
[88] Kochenov (n 2) 135.
[89] Bugarič (n 5) 84; Kochenov (n 2) 129.

concern to the EU's functioning, arguably undermines the entire purpose of Article 7. The tool's purpose and its construction therefore appear contradictory: the tool which exists to protect the EU's values is left to bodies which are possibly least concerned with their protection.

4. Conclusion

Article 7 was to serve as the EU's prime mechanism for the enforcement of its values, but both the way it was used and the way in which it was construed severely weakened its capacity to act as intended. Thus, while in theory the tool may have appeared as a powerful deterrent, capable of effectively protecting the EU's values, its operation in practice has turned out lacklustre. It has been argued that this ineffectiveness is attributable to three reasons.

First, the failure of the EU's institutions to initiate the mechanism before the regimes had 'crossed the political Rubicon and burned its diplomatic bridges'[90] – a creative way of saying that the regimes had entrenched themselves in power and it was going to be difficult to dissuade them from reverting their policies – limited Article 7's softer, preventative arm's enforcement capacity given that the mechanism was 'not… designed to ensure regime change' but for preventing a deterioration.[91] Such delays also neutered the tool's sanctioning arm given its unanimity threshold under Article 7(2) TEU. The tool is now arguably no longer capable of reverting the backsliding because of this failure to act.

The second and third reasons relate to Article 7's construction. The sanctioning arm's unanimity threshold, and the difficulties associated with encouraging the Council to act have illustrated that Article 7 is an ineffective tool for policing the EU's values in its current form.

Article 7(2)'s unanimity threshold is unattainable when there are two violators (if they cannot be simultaneously subjected to the procedure). Some have suggested that to resolve this problem the EU should in the future consider lowering the threshold of Article 7(2) to match that of the four-fifths supermajority found in Article 7(1) TEU.[92] But while it is argued that

[90] Grzeszczak and Terrett (n 1) 356.
[91] Kochenov (n 2) 144.
[92] Bonelli (n 37) 392. See also Bugarič (n 5) 91.

such a move would be a step in the right direction, with the tool becoming more accessible and the risks associated with over and under enforcement being somewhat ameliorated, it would still not respond aptly to the problem illustrated through the intergovernmental qualification. Indeed, for the EU's values to be truly capable of enforcement, it is argued that the responsibility for their protection should not rest solely with the Member States as is the case at present. Member States have too many political and diplomacy-based considerations which may dissuade them from taking difficult decisions and prioritising the protection of the EU's values over their own financial gain. As pointed out by Pech and Scheppele, it was bodies like the Commission that were purposefully created to 'act independently and whose insulation from politics was institutionally organised to enable it to take "difficult" decisions in ensuring the uniform application of Union law'.[93] By placing responsibility on the EU's intergovernmental bodies, the effectiveness of Article 7's enforcement capacity was therefore curtailed as it allowed for the possibility of other considerations being prioritised above the EU's functioning and its foundational values. Thus, lowering of the unanimity threshold by itself is insufficient. The problem with Member States' insufficient commitment to the EU's values would also have to be addressed.

But as we have acknowledged previously, despite the weakened efficacy of an enforcement tool left in intergovernmental hands, the input of Member States in such value-enforcement tools seems to be inseparable. Member States value their sovereignty and the EU – being based on cooperation – respects this. Thus, while from an efficacy perspective the EU's lesson from Article 7's ineffectiveness could be that enforcement tools should not be left to intergovernmental bodies, on a more pragmatic note we may simply note that intergovernmental decision-making should be limited or adequately balanced by inputs of other – and supranational – bodies. This could be achieved via improved accountability mechanisms, or by amending decision-making procedures.

For instance, given that it is the Member States in the two Councils that control the procedure, to ensure that this does not undermine the tool's efficacy, the CJEU's jurisdiction could be expanded so as to bring inaction under Article 7 TEU under the jurisdiction of Article 265 TFEU. This could arguably be achieved by clarifying the obligations under Article 7 TEU, such as by

[93] Pech and Scheppele (n 6) 29.

imposing a duty on the Council to regularly scrutinise the Member State through its hearings, or by clarifying the criteria against which the Court could assess the Council's inactivity. But even if such an accountability mechanism could compel States to vote – and coincidentally highlight the priorities of the Council and its Member States vis-à-vis the EU's values – this still would not ensure the protection of the EU's values as the process itself cannot change their priorities. If States are uncommitted to the EU's values it is unclear if accountability tools could change this.

Thus, from an efficacy perspective of values enforcement, a more appropriate alternative would be to ensure that powers under the enforcement mechanism are diffused.[94] This could be achieved via reverse qualified majority voting,[95] whereby the Commission would propose that a Member State has 'seriously and persistently' violated the EU's values (Article 7(2)), and unless the European Council voted against this, by qualified majority, the determination would be made. This could equally apply to Article 7(1), and to its sanctioning stage under Article 7(3) TEU. Such an approach would still respect the need to have Member State input in enforcement mechanisms, and therefore respect institutional balance, but would also not sacrifice efficacy and the need to protect and enforce the EU's values.

In any case, it is very unlikely that Article 7 will be amended in the near future given that such a process would require unanimity among the Members of the European Council and the backsliding States are unlikely to support amendments strengthening a tool which would be used against them. Therefore, while in its current form Article 7 may not be an effective tool for constraining backsliding, we may nonetheless briefly summarise some general lessons the EU could draw from this experience.

First, the EU must put adequate pressure on states violating its values, *without delay*. Failing to do so may indicate to other States that the EU is incapable or unwilling to resolve such problems and may encourage other violators. Thus, a failure to act allows for greater harm to be done to the EU. It may also weaken the EU's ability to address such crises.

[94] See, more generally, Bieber and Maiani (n 26) 1068.

[95] On reverse qualified majority voting and its potential effectiveness see Bieber and Maiani (ibid) 1066-1068, 1071, 1083.

Secondly, the EU cannot render its tools inaccessible. Finding consensus between States is difficult in any case. By requiring unanimity – in the context of an adversarial mechanism which requires states to openly condemn and sanction one another – the tool was possibly rendered inaccessible even before Poland joined Hungary in its backsliding.

Lastly, the EU's intergovernmental bodies (if left unchecked) are not suitable guardians of the EU's values.

Conclusion

The argument in this thesis was prefaced by an assumption that rule of law backsliding poses an increasingly serious challenge to the EU. It was argued that Poland's failure to recognise and enforce decisions of the CJEU, thereby undermining the key facets – such as supremacy or autonomy – upon which the EU's legal order is based, challenges the very existence and integrity of the EU's legal order, and thus the very future of the integration process. With that in mind, the thesis has attempted to illustrate some of the reasons as to why the EU's hitherto approach to rule of law backsliding in Poland was ineffective. By examining the operation of the RLF and Article 7 TEU in Poland, a series of flaws were identified, and lessons drawn, with the aim of ascertaining how the EU could improve its response to backsliding. It is argued that the EU must be responsive to the following four lessons.

Lesson 1: soft enforcement is ineffective against defiant, backsliding states

Rule of law backsliding states are defiant and uncooperative. The EU must acknowledge that for such states, assumptions of compliance and an unwavering commitment to mutual trust may be unfounded. Because of this assumption, the EU's current dialogic (soft enforcement) approach reflected through the RLF and Article 7(1) TEU has failed to halt backsliding. It is argued that, even if Article 7 had been used well by the Council – and it issued recommendations and a warning – the effectiveness of this approach still would not have been guaranteed. Poland has happily misled its peers in the Council and it is unlikely that its attitude would change unless significant pressure is exerted. Accordingly, for backsliding States, a case can be made in favour of harder means of enforcement, viz., enforcement which raises the cost of non-compliance so as to outweigh any benefits a State may gain from defiance. Ergo, the assumption of hard enforcement tools, which presupposes state selfishness, appears more appropriate against uncooperative states than the soft enforcement assumption that States will be cooperative and refrain from purposefully violating their obligations. That is not to say that effectiveness of hard enforcement is guaranteed, especially as the EU is incapable of forcing legislative change. Its sanctioning tools, be it via Article 7(3) TEU or Article 260 TFEU, rely on the 'hope' that this additional

pressure will be sufficient to induce change.[1] Nonetheless, given the failure of the soft and dialogic approach, it is time for the EU to understand that defiant states need to be dissuaded from further defiance; they cannot simply be "talked out of it."

Lesson 2: rule of law crises are time sensitive

The EU must acknowledge, *and act on*, the time-sensitivity of rule of law backsliding. The EU failed to activate Article 7 against Hungary for almost eight years. It gave Poland two years – during which Poland subordinated the CT and began to introduce legislation affecting the composition and functioning of the judiciary – before it activated Article 7. It is not guaranteed that an earlier activation of Article 7 would have prevented further deterioration in Poland or Hungary, and indeed an argument to that effect would represent a counterfactual. But we may nonetheless notice the obvious implications of the EU's hitherto delays in escalating its response. For instance, by failing to exert sufficient pressure so as to deter further violations the EU gave PiS and Fidesz additional time to erode various checks and balances and thus to entrench themselves in power. In so doing, the EU has limited its own ability to resolve rule of law backsliding. The EU may not, for instance, restore the independence of a judiciary which has been continuously replaced by pre-selected regime supporters. The EU's tools could prevent future deterioration, if adequate pressure is exerted, but they cannot revert damage done by a systemic, comprehensive, and continuous scheme to replace and subordinate the judiciary. The EU's failure to exert sufficient pressure, *in a timely manner*, has therefore allowed for further deterioration and it has weakened the ability of the EU's tools to resolve backsliding. Not to mention the fact that by failing to activate Article 7 against Hungary the likelihood of the tool's sanctioning arm being activated became slim. Poland and Hungary are now willing and able to veto any Article 7(2) determination if the EU was to resort to it. Simply put, the EU cannot only speak of acknowledging the time-sensitivity of backsliding, as it has done,[2] it must also act on it in a meaningful manner. This requires the EU to be pragmatic. If one method has failed the first time, the EU must move on and adapt

[1] Müller makes this point in the context of Article 7(3) TEU sanctions, but it is believed this point applies equally to any sanctions imposed by the EU. See Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' (2015) 21 ELJ 141, 144.

[2] Commission, 'Strengthening the rule of law within the Union: A blueprint for action' (Communication) COM/2019/343 final, 14.

as relying on it again is unlikely to yield a different result. There is no problem with trying dialogue at first instance – and it may even be warranted for legitimacy reasons, especially following the Haider Affair's events. The problem occurs when the same method is resorted to continuously, without any substantial changes being seen. A failure to do so allows the regimes to further entrench themselves in power, which then weakens the EU's ability to address the problem.

Lesson 3: tools protecting the EU's values must be accessible

While this may seem obvious, the EU's tools must be accessible. The values in Article 2 TEU are supposed to be shared by the EU's Member States as without a shared commitment to these values the future of the integration project – and the EU project as a whole – is likely to be at risk. It therefore seems counterintuitive to create a tool – the purpose of which is to protect the very foundations of the EU – which is inaccessible. Yet Article 7's sanctioning arm possesses a unanimity threshold which makes it so. Even absent the veto from Poland or Hungary, viz., if the mechanism was initiated against the two simultaneously, it would still require the 25 remaining Member States to openly and publicly denounce the actions of the governments in their fellow Member States. Such a widespread commitment from the EU's Member States to the values in Article 2 TEU is absent at present.

There may have been good reasons for locking away a tool as theoretically powerful as Article 7's sanctioning arm given the EU's foundations in sincere cooperation and an assumption of the Member States' commitment to the EU's values. Indeed, if the EU's Member States were truly committed to its values, there would be no need for a tool as powerful as Article 7. In turn restricting its use so as to make it an option of last resort makes sense. However, especially after backsliding began, the EU's institutions must be aware that its Member States are not equally committed to its values. These values must therefore be protected, by a tool which is capable of activation. Creating a tool – no matter how powerful – which cannot be utilised, defeats its purpose. Poland does not perceive Article 7 as a deterrent, and Minister Czaputowicz even called it 'dead'. The EU must recognise that its tools must be usable if they are to have a deterrent effect.

This could take the form of lowering unreasonably high procedural thresholds. However, crucially, such a decision must come with another acknowledgment. Namely, it is that States

are reluctant to criticise and sanction one another – this is clear from *inter alia* Article 7's proceedings, but also from the reluctance of States to resort to Article 259 TFEU inter-state infringements. Accordingly, in order to make its enforcement tools accessible and effective, the EU must go beyond rendering procedural thresholds attainable, it must also be responsive to problems associated with intergovernmental decision-making.

Lesson 4: Member States lack adequate commitment to the EU's values

The final lesson refers to increasing the accessibility of a values enforcement tool by ensuring its effectiveness is not wholly dependent upon intergovernmental decision-making. Arguably a body tasked with protecting the EU's values ought to prioritise the EU's needs. It should desire the proper functioning of the EU, its legal order, and its development. Such a body should be committed to ensuring there is no deviation from the EU's values, given the EU's foundations in the concept of mutual trust, which depends upon a shared commitment by all actors and Member States in equally upholding and respecting the EU's laws and values. Member States, however, appear to lack a strong commitment to this, and are likely to prioritise their own interests over those of the EU (even though it is likely that they will intersect at one point). They engage in assessments of political and diplomatic expediency; they understand that sanctions may not only be costly for the violating State but also for the body initiating the sanctions. Accordingly, it may be counterintuitive to make the effectiveness of a value enforcement mechanism depend solely on the political will to act of a body whose members may lose out if action is taken and values are protected.

That is not to say that there should be no intergovernmental input in values enforcement mechanisms – and indeed such tools cannot exist without purchase from Member States – but a more appropriate balance can certainly be struck, viz., one which acknowledges the flaws of intergovernmental decision-making. For instance, reverse qualified majority voting could be resorted to in enforcement mechanisms. It is a procedure which would lead to the imposition of sanctions proposed by the Commission *unless* the Council voted against the sanctions (or amended them) by qualified majority. Such a mechanism would not sacrifice intergovernmental decision-making but would increase the efficacy of the tool. Importantly, it would also bring attention and scrutiny to the Council if it failed to sanction a situation posing a clear and obvious violation to the EU's values. Therefore, another viable alternative

would be to ensure there exist greater accountability mechanisms – the current accountability mechanisms for failure to act appear inappropriate given the lack of clear legal obligations deriving from Article 7's phrasing. The Council's failure to act therefore cannot be sufficiently scrutinised or condemned, as the Council has complete discretion over when and how to act if the EU's values are being violated.

The point being made here is that Article 7 was created by Member States and vested the power of this very important tool in their hands. This ought to create a responsibility to act, as only the Member States can render the tool effective. Without this responsibility being enforceable as a legal duty or an obligation, the tool is unlikely to be effective owing to the nature of intergovernmental decision-making, even if the procedural thresholds of the tool are lowered. Simply put, in acknowledging the need to make its tools accessible, the EU also needs to acknowledge that intergovernmental bodies have other considerations which can outweigh and weaken values enforcement considerations. Thus, from an efficacy perspective this needs to be resolved. Member States cannot have their powers limited completely due to sovereignty considerations, but there should exist ways to scrutinise their inactivity or compel them to act. In short, power and responsibility should be meaningfully shared, especially at the enforcement stages.

A light at the end of the tunnel

The aforementioned lessons may be simple, but they are argued to be crucial if the EU is to become better equipped at addressing rule of law backsliding. That is not to say that supranational interference is the ultimate panacea; backsliding is a complex matter which requires a multi-faceted approach. Sanctioning and international pressure may slow down backsliding, with the regimes either refraining from certain violations, or introducing legislative amendments in order to create a façade of compliance, but it is unlikely to completely halt it. These are regimes committed to entrenching themselves in power and it is possible that the only way to truly resolve this crisis is through civic empowerment leading to transition of power via democratic elections.[3]

[3] See, e.g., Paul Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*

However, even if the EU cannot solve backsliding itself, it can play a crucial role in delaying the violations and in highlighting the problem. The EU may have failed to fulfil this role in the past, but we are seeing positive signs of development. The EU has recently introduced a conditionality mechanism which, while deficient in certain ways,[4] represents a clear improvement on the two mechanisms assessed in this thesis.[5] It is a sanctioning tool, possessing strict timeframes for escalation, at the end of which the Council will be obliged to vote on the matter (and therefore will not be able to indefinitely delay the mechanism's conclusion). The Commission has also more recently illustrated it is willing to protect the EU's values by threatening Poland with Article 260 TFEU sanctions for non-compliance with CJEU judgments, and by refusing to accept Hungary's national resources plan thereby precluding it from claiming EU finances following its recent proposal of anti-LGBT legislation.[6]

Jan-Werner Müller once said that the problem with the enforcement of EU's values lies not in the EU's lack of authority or legitimacy to act, but in the lack of suitable tools.[7] By resorting to stronger means of enforcement we are possibly witnessing a new EU – one which is capable of and willing to protect its values.[8] If it can secure the will to act, the EU can raise the stakes of non-compliance and contribute positively to halting or at least slowing down deterioration.

(CUP 2016) 268; Bojan Bugaric, 'The Right to Democracy in a Populist Era' (2018) 112 AJIL Unbound 79, 83.

[4] Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (*Verfassungsblog*, 13 December 2020) <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/> accessed 28 August 2021; Alberto Alemanno, 'The EU Parliament's Abdication on the Rule of Law (Regulation)' (*Verfassungsblog*, 25 February 2021) <https://verfassungsblog.de/the-eu-parliaments-abdication-on-the-rule-of-law-regulation/> accessed 28 August 2021.

[5] Parliament and Council Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ LI 433/1; Peter Lindseth and Cristina Fasone, 'Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely 'Constitutional' EU?' (*Verfassungsblog*, 11 December 2020) <https://verfassungsblog.de/rule-of-law-conditionality-and-resource-mobilization-the-foundations-of-a-genuinely-constitutional-eu/> accessed 28 August 2021.

[6] Gabriela Baczynska, 'EU holds up Hungary's recovery money in rule-of-law standoff' (*Reuters*, 12 July 2021) <https://www.reuters.com/article/us-eu-recovery-hungary-idUSKBN2EI1ET> accessed 28 August 2021; Sam Fleming and James Shotter, 'Brussels warns Poland to comply with EU court rulings or face fines' (*FT*, 20 July 2021) <https://www.ft.com/content/9591a832-681b-41a0-aa54-572bbe5b60dd> accessed 28 August 2021.

[7] Müller (n 1) 146.

[8] Lindseth and Fasone (n 5); Niels Kirst, 'Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' (2021) 6(1) European Papers, Insight 101, 110.

One can only hope – for the sake of the rule of law in the EU and in its Member States – that it follows through and punishes the violators to dissuade further deterioration.

The circumstances surrounding rule of law backsliding in the EU's Member States are constantly developing and changing. While the facts and some of the assessment made in this thesis may become outdated, the lessons drawn from the EU's experience are believed to be relevant for the future. If the EU wants to construct stronger enforcement tools, it must constantly keep adapting and learning from what turned out ineffective.

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